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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-97

ROGER JON DIAMOND; WILLIAM DUXLER; and PEOPLE'S LOBBY, INC.,

Petitioners,

vs.

FRANK BLAND, Sheriff of San Bernardino County; LOUIS J. FORTUNA, Chief of Police of City of San Bernardino; LOWELL E. LATHROP, District Attorney of San Bernardino County; James LAMBERT; C.H. BARRET; AL C. BALLARD, Mayor of City of San Bernardino; and HOMART DEVELOPMENT COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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FRANK BLAND, Sheriff of San Bernardino County; LOUIS J. FORTUNA, Chief of Police of City of San Bernardino; LOWELL E. LATHROP, District Attorney of San Bernardino County; JAMES LAMBERT; C.H. BARRET; AL C. BALLARD, Mayor of City of San Bernardino; and HOMART DEVELOPMENT COMPANY,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Roger Jon Diamond, William Duxler, and People's Lobby, Inc. pray that a Writ of Certiorari issue to review the opinion, and judgment issued pursuant thereto, of the Supreme Court of California filed on April 25, 1974,

and which became final on June 26, 1974. The Supreme Court of California denied a petition for rehearing on May 29, 1974.

OPINIONS BELOW

The four-to-three opinion of the Supreme Court of California, review of which is sought, is reported as Diamond v. Bland, 11 Cal. 3d 331, 113 Cal. Rptr. 468, 521 P. 2d 460 (1974). The two-to-one opinion of the California Court of Appeal, Fourth Appellate District, Division Two, is reported as Diamond v. Bland, 33 Cal. App. 3d 385, 109 Cal. Rptr. 248 (1973). The order of the Superior Court of the County of San Bernardino is not reported. The previous six-to-one opinion of the Supreme Court of California is reported as 3 Cal. 3d 653, 91 Cal. Rptr. 501, 477 P. 2d 733 (1970). The orders of the Supreme Court of the United States denying certiorari and petitions for rehearing are reported as Homart Development Co. v. Diamond, 402 U.S. 988, 91 S.Ct. 1661, 29 L.Ed. 153 (1971); 404 U.S. 874, 92 S.Ct. 27, 30 L.Ed. 120 (1971); 405 U.S. 981, 92 S.Ct. 1189, 31 L.Ed. 2d 257 (1972); 409 U.S. 897, 93 S.Ct. 9, 34 L.Ed. 154 (1972). The initial, unanimous decision of the California Court of Appeal, Fourth Appellate District, Division Two, is reported as Diamond v. Bland, 8 Cal. App. 3d 58, 87 Cal. Rptr. 97 (1970). The original orders of the trial court are not reported. The opinions are reprinted in the Appendix.

JURISDICTION

The judgment of the Supreme Court of California was entered April 25, 1974. On May 10, 1974, petitioners timely filed a petition for rehearing. On May 13, 1974, the Supreme Court of California extended its time for granting or denying a rehearing to and including June 24, 1974. On May 29, 1974, the Supreme Court of California denied (with three justices dissenting) the petition for rehearing. On the same day, the dissenting opinion was modified. On June 21, 1974, petitioners applied for an Order Vacating Order Denying Petition for Rehearing, but the application was dismissed on June 26, 1974.

This Court has jurisdiction under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

1. Do the Fifth and Fourteenth Amendments bar a state from permitting its citizens, under its state constitution, to collect signatures on initiative petitions on the premises of shopping centers which are open to the general public and which are places of public accommodation under state law, where the signatures can be collected without disruption of or interference with the business of the center, where the signatures can only be collected in a face-to-face meeting between the solicitor and the signer, and where the circulator of the initiative petitions

abides by regulations promulgated by the shopping center and by state statutes governing the initiative process?

2. Does a state court injunction permitting the peaceful and orderly solicitation of signatures on initiative petitions being circulated pursuant to the state constitution on the premises of a shopping center which under state law is a place of public accommodation constitute state action so as to warrant consideration of the contention that such injunction violates the purported Fifth and Fourteenth Amendment rights of the shopping center? Does such an injunction violate the Fifth and Fourteenth Amendments?

3. Does the United States Supreme Court's five-to-four decision in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), which held that the free speech provision of the First Amendment did not warrant the distribution of handbills at a shopping center where they could just as effectively be distributed outside the shopping center to motorists driving in, apply to the circulation of initiative petitions at a shopping center pursuant to a state constitution and pursuant to that portion of the First Amendment which guarantees the right to "petition the government for a redress of grievances," where signatures cannot be obtained from motorists entering the shopping center?

4. In balancing First Amendment rights with Fifth and Fourteenth Amendment property rights of shopping centers, did the California Supreme Court err in

treating handbilling and petition circulation the same, in view of the fact that handbilling is protected by the free speech provision of the First Amendment whereas petition circulation is protected by that portion of the First Amendment which protects the right to "petition the government for a redress of grievances"?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First, Fifth, Tenth and Fourteenth Amendments to the United States Constitution, California Constitution, Article I, Sections 9 and 10, and Article IV, Sections 1, 22, and 24, and, indirectly, California Penal Code Section 602(l) and Ordinance 2941 of the City of San Bernardino, all of which are set out in the Appendix, except the following, which are set forth herein at the pages indicated: Tenth Amendment, p. 26; California Constitution, Article IV, Section 24, p. 11.

STATEMENT OF THE CASE

Roger Jon Diamond was an official proponent (under California Elections Code Section 29210) of two environmental initiative petitions which were being circulated for the California statewide ballot in 1969. He was also an official proponent of an environmental initiative petition (known as the Clean Environment Act) which qualified for the California statewide ballot in 1972, but which was rejected by the electorate. He was also the official proponent of an initiative petition (known as the Political Reform Act of 1974, Proposition 9) which qualified for the June 1974 ballot (prior to the decision of the California Supreme Court) and which was approved by the electorate. Diamond desires to continue utilizing the initiative process guaranteed by the California Constitution. William Duxler was a volunteer initiative petition circulator who was expelled from a shopping center owned by respondent Homart Development Co. People's Lobby, Inc. is a volunteer citizens organization dedicated to political and social reform through the initiative process. People's Lobby, Inc. has sponsored all of the initiative petition drives mentioned herein, and desires to continue utilizing the initiative process for political and social reform. (Reporter's Transcript of Trial in San Bernardino Superior Court, pp. 10-16, 25-26, 139, hereinafter designated RT I; Reporter's Transcript of Hearing on Motion to Dissolve Permanent Injunction in San Bernardino Superior Court, pp. 7-9; Petition for Writ of

Supersedeas to the California Supreme Court, pp. 1-7). (For purposes of convenience, all three petitioners will be referred to herein as "petitioners.")

Respondent Homart Development Company owns and operates Inland Center, the largest shopping center in the County of San Bernardino (RT I, 138-139). Inland Center consists of three major stores, Sears, May Co., and Broadway, and seventy-two "tenant" stores, all of which front on a thirty-two feet wide mall (RT I, 118; Clerk's Transcript of trial in San Bernardino Superior Court, pp. 73-76, hereinafter referred to as "CT I;" the Clerk's Transcript of the hearing on the motion to dissolve the permanent injunction will be referred to as "CT II.")

Although motor vehicles can and have been driven through the mall area for maintenance and display purposes (RT I 121), motor vehicles are not driven in the mall area during normal business hours, during which time the public is on foot (RT I 121-122).

Twenty-five thousand persons a day, on the average, shop and visit Inland Center, and there have been as many as eighty-three thousand persons at Inland Center on certain days (RT I 110-111). All persons who visit Inland Center arrive by motor vehicle and drive into the huge parking lot on the premises, which has streets governed by motor vehicle traffic regulations (RT I 112, 123). At each entrance to the parking lot there are "No Trespass" signs indicating that it is private property and admission is subject

to revocation (CT I 76). As many as 33,000 cars may visit the center on a given day and, as a result, extremely heavy vehicular traffic congestion may occur in the parking lot (CT I 75; RT I 110-111). The area serviced by Inland Center includes locations as far away as 75 miles and includes an area of approximately one million inhabitants (Reply Brief of Respondents Homart Development Co.; James Lambert, and C. H. Barrett, filed in Diamond v. Bland, 4 Civ. No. 10084, California Court of Appeal). Inland Center is located in a "fairly isolated" non-residential area and is bounded by a drainage channel, a six-lane Interstate highway and a commercial street (CT I 73-74; RT I 75-78; Resp. Exs. D and F).

There are six major entrances and exits to and from the mall area (RT I 113), permitting the public to walk in and through the mall. Inland Center encourages the public to walk and not to sit in the mall area (RT I 119). No admission price is charged for entry into the mall, and no representative of Inland Center checks persons at the various entrances (RT I 115; CT I 75). There is no requirement that persons make a purchase in order to walk through the mall, and members of the public are encouraged to visit Inland Center and walk through the mall area even though they may not make a purchase (CT 75-76).

California's Constitution, like the constitutions of 20 other states,[1] guarantees its citizens the right to enact legislation by the initiative

process. Article IV, Section 1 provides as follows:[2]

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1. In addition to California, the following states provide their citizens with the fundamental right of the initiative: Alaska, Const., Art.XI, Secs. 1, 3 and 4; Arizona, Const. Art. 4, Pt.1, Sec. 1; Arkansas, Const. Art. 7; Colorado, Const. Art. V, Sec. 1; Idaho, Const. Art. III, Sec. 1; Illinois, Const. Art. 14, Sec. 3; Maine, Const. Art. IV, Sec. 18; Massachusetts, Art. XLVIII; Michigan, Const. II, Sec. 9; Missouri, Const. Art. 3, Secs. 49, 50 and 53; Nebraska, Const. Art. III, Secs. 1 and 2; Nevada, Const. Art. 19, Sec. 2; North Dakota, Const. Art. II, Sec. 25, Art. XV, Sec. 202; Ohio, Const. Art. II, Secs. 1 and 1a; Oklahoma, Const. Art. 5, Secs. 1 and 2, Art. 34, Sec. 4; Oregon, Const. Art. IV, Sec. 1; South Dakota, Const. Art. III, Sec. 1, Art. XXIII; Utah Const. Art. VI, Sec. 1; Washington, Const. Art. II, Secs. 1 and 1a; and Wyoming, Const. Art. 3, Sec. 52. In addition, most of these states have the recall and referendum, which entail the circulation of petitions to be signed by the voters. Three states have only the recall: Kansas, Const. Art. 4, Sec. 3; Louisiana, Const. Art. 9, Sec. 9, and Wisconsin, Const. Art. 13, Sec. 12. Three states have only the referendum: Kentucky, Statutes, Secs. 132.1-0 and 171; Maryland, Const. Art. XVI, Secs. 1, 2 and 3; and New Mexico, Const. Art. IV, Sec. 1.

2. Some of the details of the initiative in California are set out in other constitutional provisions and in the California Elections Code. California

Constitution, Art. IV, Sec. 22, provides as follows:

"(a) The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.

"(b) An initiative measure may be proposed by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed by electors equal in number to 5 percent in the case of a statute, and 8 percent in the case of an amendment to the Constitution, of the votes for all candidates for Governor at the last gubernatorial election.

"(c) The Secretary of State shall then submit the measure at the next general election held at least 131 days after it qualifies or at any special statewide election held prior to that general election. The Governor may call a special statewide election for the measure.

"(d) An initiative measure embracing more than one subject may not be submitted to the electors or have any effect."

California Constitution, Article IV, Sec. 24, provides in part, as follows:

". . .

"(d) Prior to circulation of an initiative or referendum petition, for signatures, a copy shall be submitted to the Attorney General who shall prepare a title and summary of the measure as provided by law.

"(e) The Legislature shall provide the manner in which petitions shall be circulated, presented, and certified, and measures submitted to the electors."

The Elections Code governs the details of the initiative process. The proponents of an initiative must comply with numerous provisions of the Elections Code. The persons who commence the initiative process are known as the proponents. Elections Code Section 29210 (hereinafter just the Section number will be given since all references will be to the Elections Code).

The proponents must submit a draft of their proposed initiative to the Attorney General with a written request that he prepare a title and brief summary. Section 3500.5 and 3501. At this time they must also pay a fee of two hundred dollars (later refunded if their measure qualifies for the ballot). Section 3501.

From the date the Attorney General mails to them his title and summary (the "official summary date"), the proponents have ninety days before their first mailing deadline, Section 3507, during which they must prepare their petitions, then

circulate copies of it among the people for the collection of signatures. Section 3507. Petitions are circulated on a county-by-county basis, and only registered voters of a given county may circulate or sign petitions in that county. Section 3512. Each signer must sign his name (as registered), address and date of signing. Sections 45 and 3511. Before the petition is filed with the county clerk or registrar of voters, the proponents must see to it that each signature is followed by a precinct designation. Sections 46 and 3511.

Copies of the petitions circulated in a particular county are to be filed anytime prior to the 90 days filing deadline with the clerk or registrar of voters of that county. Sections 3520(a) and 3507. All petitions filed in a given county must be filed simultaneously; signatures collected but not filed at this time are worthless. Section 3520. An affidavit of the person circulating the petition attesting to his qualifications and the validity of the signatures he collected must be attached to each copy of the petition filed. Section 3513. The clerk then has 20 days to examine the signatures. Section 3520(b). Upon completion of his examination, the clerk immediate certifies the results to the Secretary of State. Section 3520(c).

The proponents have 40 days from the date the clerk certifies to the Secretary of State the results of his examination of their first petitions in which to circulate and file supplemental copies of

their petition. Section 3520(d) and 3507. The end of this 40 days period is the "second filing deadline." Supplemental petitions are to contain signatures collected only after the first filing. Section 3520(d). The clerk has 10 days to examine these signatures and to certify the results to the Secretary of State. Section 3522.

An initiative petition is deemed filed with the Secretary of State, and thus the measure is qualified for the ballot, as of the date he has received certification of the sufficient aggregate number of signatures from the various clerks. Section 3523.

In addition to the requirements imposed on proponents mentioned above, various penal provisions also govern the initiative process.

It is a felony to misrepresent the contents of the proposed measure to persons whose signatures are being solicited. Sections 29214 and 29215.

It is also a felony to obtain false signatures or file petitions with false signatures. Sections 29216 and 29217.

It is also a felony for persons to sign more than once, to sign when not qualified, or to sign a fictitious name or someone else's name. Sections 29220 and 29221.

It is a felony to abuse the initiative system. Section 29224.

The proponent or proponents of referendum petitions must file the petitions circulated within the time allotted. Failure to do so is a felony. Section 29225.

Other crimes, generally specified as misdemeanors, cover the initiative process. For example, Section 29250 provides as follows:

> "Every person who threatens to commit an assault or battery on a relative of a person circulating a referendum, initiative, or recall petition or to inflict damage on the property of such circulator or such relative, with the intent to dissuade the circulator from circulating the petition or in retribution for such circulation is guilty of a misdemeanor.

Section 29251 provides:

> "Every person who forcibly or by stealth takes from the possession of a circulator any initiative, referendum, or recall petition is guilty of a misdemeanor."

(RT I 10-16; CT I 77-78).

The "free speech" provision of the California Constitution is contained in Article I, Section 9. California also has its own provision on the right to petition for a redress of grievances. Article I, Section 10 provides:

> "The legislative power of this State is vested in the California legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum."

The number of signatures of registered voters in California necessary to qualify a proposed constitutional amendment for the statewide ballot generally is about 520,000. For a proposed statute it is about 325,000. The signatures must be gathered within a period of approximately five months (RT I 10-15). More than the minimum number must be secured because many signatures prove to be invalid. Generally, about 3,500 signatures must be gathered each day, on average (Dissenting Opinion of Justice Mosk). City and county ordinances may also be adopted by the initiative process in California.

Petitioner Duxler was ejected from Inland Center in 1969 while gathering signatures on initiative petitions in a peaceful and orderly manner. The business of the center was not disrupted. Inland Center has an absolute ban on all such activity, whether it be in the mall, on the sidewalk surrounding the structure, or in the parking lot (all

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> "The people shall have the right to freely assembly together to consult for the common good, to instruct their representatives, and to petition the Legislature for a redress of grievances."

a part of Inland Center)[3] (RT I 29, 31-34, 37-42, 47-50, 113-114; CT I 81).

Petitioners immediately filed suit in the Superior Court of San Bernardino, alleging that respondents' refusal to permit the circulation of initiative petitions at Inland Center violated petitioners' rights under the California Constitution and statutes relative to the initiative process, as well as petitioners' rights under the First Amendment. Petitioners sought both injunctive as well as declaratory relief (CT I 1-8).

At the trial petitioners produced evidence regarding the need for shopping center access for their initiative petitions. Petitioner Duxler testified that petitioners had "tried just about everything." He continued,

> "For example, we have contacted radio stations. Radio stations can put spots on for us, but we have had almost no response at all from radio stations and, of course, we can't get signatures from the radio station.

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3. Petitioner's distribution of leaflets relating to the petitions was not the reason for his ejection; nor was his use of a card table. Petitioner's mere circulation of petitions at the center was the reason for his expulsion. Inland Center prohibits such conduct throughout the center (mall, sidewalks, parking lot), even though it is peaceful, orderly, and nondisruptive (RT I 71-72, 113-114; CT I 81).

"We have solicited support from newspapers. We have been unable to receive any support of any kind from the Riverside Press Enterprise. The Sun Telegram has been somewhat more friendly but we haven't had any kind of support that, you know, will help us get signatures. At least, none that I have noticed. We have tried telephoning. We have actual lists of persons who have written in to, for example, the Press Enterprise Smog Poll and indicated that they are concerned about smog and tried telephoning these people and we have actually mailed out a few petitions but very few are returned. Our entire strategy is based on trying to set up tables at markets and shopping centers and to get signatures at these markets. For example, we can fill anywhere from ten to thirty or more petitions at a single market. We work at markets well."

Duxler continued,

"We tried going to several football games and had very poor success. As far as I know there aren't major football games in the sense of a professional game and not a lot of people who are registered voters at the game. We have tried setting up at several football games like high school football games or college games and there were so many persons that were not registered voters we were unable to get very many signatures.

"Also, we have looked into the matter of public parks. That comes

> to my mind because it was mentioned in some of the other questioning, and the idea of going to a public park to get signatures is just not even tenable."

Duxler explained his statement as follows:

> "Because if you go to a public park, you will find, maybe, one or two people sitting around, maybe more than that, but not enough people at all and not in any kind of small area. It would just be a total waste of time."

Duxler testified that sporting events do not provide effective means for petition circulation because the fans usually rush in to get a particular seat and do not have time to stop to read the petition. (RT I 26-28)

Additional testimony was also presented to the same effect, namely, that the only effective way to get signatures on initiative petitions is to go to shopping centers (RT I 24-25).

Respondents attempted to demonstrate that there were other areas available for signatures, such as the Orange Show and the Kaiser Steel Plant. However, petitioners demonstrated that the Orange Show usually has only one event a year, which occurs in March. Interim activities only draw small, special interest groups. The Kaiser Steel Plant was demonstrated to be ineffective because the employees drive in through a gate where a guard is stationed who keeps out unauthorized persons (RT I 136-138).

No evidence was presented by respondents to establish the existence of alternate effective locations for the circulation of initiative petitions.

After the nonjury trial, the trial judge made some comments from the bench (printed in the Appendix), and ruled in favor of respondents, denying petitioners' requested relief.

Formal Findings of Fact and Conclusions of Law were filed. Finding No. 28 states:

> "There are many alternative sites and techniques available to plaintiffs. It is possible to conduct the subject activities on the public sidewalks of San Bernardino, in its parks, public buildings, at houses of worship, at entertainment centers, athletic contests, at many factories in and around San Bernardino and near its many military installations. Contact can also be had with the public through newspapers (See Exhibit "D" to the complaint), radio, telephone, door-to-door, mailings. Some of these sites or techniques are ineffective, others are too costly, but some have never been tried. In some cases, arrangements are just being made to implement certain of these techniques." (CT I 83)

The judgment in favor of respondents was entered on December 5, 1969. Petitioners appealed to the California Court of Appeal, Fourth Appellate District, Division Two, which affirmed the judgment on May 25, 1970, Diamond v. Bland, 8 Cal. App. 3d 58, 87 Cal. Rptr.

97 (1970). The opinion was written by Justice Gardner, and concurred in by Acting Presiding Justice Kerrigan and Justice Tamura. On June 17, 1970 the Court of Appeal denied a petition for rehearing without opinion. On September 10, 1970, the Supreme Court of California granted a petition for hearing filed by petitioners, which vacated the Court of Appeal decision.

On December 16, 1970, the Supreme Court of California reversed the judgment of the trial court, Diamond v. Bland, 3 Cal. 3d 653, 91 Cal. Rptr. 501, 477 P.2d 733 (1970). In a six-to-one opinion, the Supreme Court of California held that petitioners were entitled to a judgment confirming their right to circulate initiative petitions and to engage in other peaceful and orderly First Amendment activities on the premises of the Inland Center.

Pursuant to the mandate of the California Supreme Court, the trial court granted a permanent injunction in favor of petitioners on February 1, 1971 (CT I 19-20).

Respondent Homart Development Co. sought review of the California Supreme Court's decision by a petition for writ of certiorari, Homart Development Co. v. Diamond, October Term, 1970, No. 1469. On May 17, 1971, this Court denied the petition for writ of certiorari; the Chief Justice and Mr. Justice Blackmun were of the opinion that certiorari be granted, Homart Development Co. v. Diamond, 402 U.S. 988, 29 L.Ed. 153, 91 S.Ct. 1661 (1971). On October 12, 1971

this Court denied a petition for rehearing, Homart Development Co. v. Diamond, 404 U.S. 874, 30 L.Ed.2d 120, 92 S.Ct. 27 (1971).

On January 17, 1972, this Court granted certiorari in Lloyd Corp. v. Tanner, 404 U.S. 1037, 30 L.Ed.2d 728, 92 S.Ct. 710 (1972). Petitioners herein filed an amicus curiae brief in Lloyd Corp. v. Tanner wherein the right to circulate initiative petitions pursuant to the California Constitution and statutes and the right to petition the government for a redress of grievances under the First Amendment were brought to the attention of this Court so that this Court would be aware of the impact on those rights a decision in Lloyd Corp. v. Tanner might cause. Subsequently, this Court handed down its five-to-four decision in Lloyd Corp. v. Tanner, 407 U.S. 551, 33 L.Ed. 2d 131, 92 S.Ct. 2219 (June 22, 1972), wherein this Court restricted its discussion to handbilling and did not mention petitioning.

On March 6, 1972, this Court denied a joint motion for leave to file a petition for rehearing. The Chief Justice and Mr. Justice Blackmun were of the opinion that the motion be granted, Homart Development Co. v. Diamond, 405 U.S. 981, 31 L.Ed.2d 257, 92 S.Ct. 1189 (1972).

On October 10, 1972, this Court denied a motion for leave to file a third petition for rehearing. Mr. Justice Blackmun would have called for a response pursuant to Rule 58(3), Homart Development Co. v. Diamond, 409 U.S. 897, 34 L.Ed.2d 154, 93 S.Ct. 9 (1972).

On October 26, 1972, respondent Homart Development Co. filed a motion with the San Bernardino County Superior Court to dissolve the permanent injunction previously granted on February 21, 1971. The sole ground of the motion was the contention that this Court's decision in Lloyd Corp. v. Tanner "is now controlling and constitutionally precludes the issuance of an injunction in the circumstances here involved." (CT II 25-73).

Petitioners resisted the motion, contending in the trial court that Lloyd Corp. v. Tanner was not controlling because:

1. Unlike the handbilling in Lloyd Corp. v. Tanner, the circulation of initiative petitions on shopping centers in California is protected by the California Constitution and state law;

2. Unlike the handbilling in Lloyd Corp. v. Tanner, the circulation of petitions is specifically guaranteed by that portion of the First Amendment protecting the right "to petition the government for a redress of grievances;"

3. Unlike the handbilling in Lloyd Corp. v. Tanner which creates litter, the circulation of initiative petitions creates no litter;

4. Unlike the handbills in Lloyd Corp. v. Tanner, which this Court stated could be given to the same people who visit the Lloyd Center immediately prior to their entry into the center on foot or in their

automobiles, the initiative petitions in the instant case cannot be signed by those entering Inland Center in their automobiles (no one enters on foot) because petitions cannot physically be signed in this manner (through the windows of moving or slowing cars); and

5. The facts of the two cases were significantly different.

Petitioners also contended Lloyd Corp. v. Tanner was erroneously decided. Petitioners cited this Court's decisions in Police Department v. Mosley, 408 U.S. 92 (1972) and Grayned v. City of Rockford, 408 U.S. 104 (1972) as possible indications that Lloyd Corp. v. Tanner would be overruled or limited to its own facts.

Petitioners also suggested in resisting the motion that the injunction could be modified to refer only to initiative petitioning.

On December 6, 1972, the trial court granted respondents' motion to dissolve the injunction, ruling that as a matter of law, Lloyd Corp. v. Tanner was controlling,and, "that, as a matter of law, there are necessarily effective alternative means of communication where a nonrelated use is sought to be engaged in on private property." (CT II 88-92). The trial court stated that its original decision in 1969 denying the injunction was correct and should not have been reversed by the Supreme Court of California (RT II 55-56).

Petitioners appealed the order

dissolving the injunction to the California Court of Appeal, Fourth Appellate District, Division Two, which had previously unanimously ruled against them. This time, in affirming the order dissolving the injunction, the Court of Appeal split two-to-one. Justice Tamura, who originally voted against petitioners, filed a dissenting opinion agreeing that Lloyd Corp. v. Tanner was "not dispositive of the case at bench." Justice Tamura would have reversed the order and directed the reinstatement of the injunction. Diamond v. Bland, 33 Cal.App.3d 385, 109 Cal. Rptr. 248 (July 10, 1973).

On July 26, 1973, the Court of Appeal denied petitioners' petition for rehearing. Justice Tamura would have granted the petition for rehearing.

On August 10, 1973, petitioners filed a petition for hearing in the Supreme Court of California. California Secretary of State, Edmund G. Brown, Jr., the chief election officer of the State of California, filed an application for leave to file an amicus curiae brief in support of petitioners. On August 14, 1973, the Supreme Court of California granted his request. (On August 13, 1973, the Court granted a similar application of the American Civil Liberties Union.) In his brief, the Secretary of State stated that access to shopping centers was extremely important to the initiative process in California. (The brief of the Secretary of State is reprinted in the Appendix.) On September 6, 1973, the Supreme Court of California granted the petition for hearing, thereby transferring the appeal to itself for decision.

Petitioners made the same contentions in the Supreme Court of California as they did in the trial court and the Court of Appeal, stressing the factual and legal distinctions between handbilling and petitioning, including, in particular, the basis in state law for petitioners' position. On April 25, 1974, the California Supreme Court, in a four-to-three decision, affirmed the order dissolving the injunction. The majority concluded that Lloyd Corp. v. Tanner required that it overrule its previous decision. Diamond v. Bland, 11 Cal. 3d 331, 113 Cal. Rptr. 468, 521 P. 2d 460 (1974).

On May 10, 1974, petitioners filed a timely petition for rehearing. On May 13, 1974, the California Supreme Court extended its time to and including June 24, 1974 in which to act upon the petition for rehearing. On May 29, 1974, the California Supreme Court denied the petition for rehearing. Justices Tobriner, Mosk, and Sullivan were of the opinion that the petition be granted. On June 21, 1974, petitioners filed an application for order vacating order denying petition for rehearing, but it was dismissed on June 26, 1974 (the Court having failed to extend its time to consider the application).

REASONS FOR GRANTING THE WRIT

A. THIS CASE PRESENTS A CONSTITUTIONAL QUESTION OF GREAT IMPORTANCE INVOLVING STATES' RIGHTS AND STATE SOVEREIGNTY AFFECTING AT LEAST TWENTY-ONE STATES

The California Supreme Court has erroneously concluded that this Court's five-to-four decision in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) precludes states from permitting their citizens to circulate initiative petitions on the premises of privately owned shopping centers. The issue unresolved by Lloyd is whether the Fifth and Fourteenth Amendments absolutely prohibit the fundamental right to circulate initiative petitions on property which the state has already determined to be "quasi-public."

This case involves the most precious and fundamental right of all, the right of state citizens to initiate legislation. It is well recognized that the federal government is a government of limited power. This limitation is expressly recognized by the Tenth Amendment, which states,

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." (Emphasis added.)

Clearly, the Tenth Amendment demonstrates that the states retained certain rights not specifically delegated to the federal government.

Beyond this, it is equally clear that in at least twenty-one states, the people of those states reserved for themselves certain powers and authority.

In California, the Constitution, Article IV, section 1, specifically sets forth the fact that the people reserved the initiative power:

> "The legislative power of this State is vested in the California legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum." (Emphasis added.)

The initiative provisions of twenty other states are substantially the same. See supra, p. 9, footnote 1.

This Court has recognized that property interests are created and defined by state law. In Board of Regents v. Roth, 408 U.S. 564, 577 (1972), this Court stated,

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. . . ."

The property interests of shopping centers were defined by the California legislature and by the California Supreme Court prior to its two Diamond v. Bland decisions. In In re Cox, 3 Cal.3d 205, 90 Cal. Rptr. 24; 474 P. 2d 992 (1970), the California Supreme Court, in considering certain local and statewide trespass ordinances and statutes, and in considering the state's civil rights act (regarding places of public accommodation), stated that the shopping center "has become the modern suburban counterpart of the town center." In re Cox, 3 Cal. 3d at 216, fn. 11. The court stated that shopping centers perform "public function[s]."

Previously, in Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union, 61 Cal. 2d 766; 40 Cal. Rptr. 233; 394 P. 2d 921 (1964), the California Supreme Court, in another "shopping center case," stated that the interest of the shopping center owner "lies in the shadow cast by a property right worn thin by public usage." Id. at pp. 774-775.

In its initial decision in Diamond v. Bland the California Supreme Court relied heavily on Cox and Schwartz-Torrance, as had three other state cases involving property interests, In re Wallace, 3 Cal. 3d 289, 90 Cal. Rptr. 176; 475 P. 2d 208 (1970); In re Lane, 71 Cal. 2d 872; 79 Cal. Rptr. 729; 457 P. 2d 561 (1969); and In re Hoffman, 67 Cal. 2d 845; 64 Cal. Rptr. 97; 434 P. 2d 353 (1967).

Thus, consistent with this Court's view of property expressed in Board of Regents v. Roth, supra, California, by

statute and judicial decision, has determined the nature and extent of the property right of shopping centers, and has defined them.

This Court has always considered and recognized as fundamentally important the sovereign rights of states, the desirability of social experimentation in the respective states, and the diverse and varying needs of the individual states, and implicit in such consideration and recognition is the awareness of the needs of the people of the states. Cf. Miller v. California, ___ U.S. ___, 37 L. Ed. 419 (1973); Nebbia v. New York, 291 U.S. 502 (1934); Olsen v. Nebraska ex rel. Western Reference & Bond Ass'n, 313 U.S. 236 (1941); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Hadacheck v. Los Angeles, 239 U.S. 394 (1915).

The issues raised by the instant case, involving as they do states rights and state sovereignty in the area of direct legislation by citizens pursuant to the initiative process reserved by the citizens of twenty-one states, certainly warrant review by this Court. This Court must and should decide whether the Fifth and Fourteenth Amendments absolutely prohibit citizens acting under authority retained by them and never delegated to either the states or federal government, from circulating initiative petitions on shopping centers the property interests of which have been determined by and defined by the states.

The California Supreme Court determined that this Court's decision in Lloyd Corp.

v. Tanner, supra, compelled reversal of its previous ruling. It is up to this Court to advise the California Supreme Court that its interpretation of the Fifth and Fourteenth Amendments is not required nor justified under Lloyd Corp. v. Tanner. In this respect this case is similar to Olsen v. Nebraska ex. rel. Western Reference & Bond Ass'n, 313 U.S. 236 (1941), where this Court said that the Nebraska Supreme Court, in determining the validity of a state statute, erroneously relied on a previous United States Supreme Court opinion in holding the state statute to be invalid under the Fourteenth Amendment. In Olsen this Court held the state statute in question not to be in violation of the Fourteenth Amendment.

B. THIS CASE PRESENTS AN IMPORTANT QUESTION UNRESOLVED BY THIS COURT IN LLOYD CORP. v. TANNER

In Lloyd Corp. v Tanner, 407 U.S. 551 (1972) this Court, on the facts presented, ruled that handbillers could not distribute their anti-war leaflets on the premises of Lloyd Center, a privately owned shopping center in Portland, Oregon. The litigation was commenced in the federal court pursuant to the federal civil rights act. Plaintiffs therein contended their First Amendment right to handbill was violated by the shopping center's refusal to permit handbilling on the premises.

In Lloyd the shopping center was located in a commercial, business area of Portland. Customers could visit the

center by walking on foot. The center was surrounded by public sidewalks. Approximately 1000 automobiles could be parked at the center. On the other hand, Inland Center is located in an isolated part of San Bernardino, is not surrounded by public sidewalks, and accommodates over thirty-three thousand automobiles. All of Inland's customers arrive by automobile, some of whom drive seventy-five miles to get there.

In Lloyd, the handbillers were able to continue their activities immediately outside the Lloyd Center on the public sidewalks by handing the leaflets to those persons entering on foot or entering by automobile (handing leaflet through the automobile window). Lloyd Center had a policy against litter. On the other hand, petitioners herein cannot obtain signatures on petitions from persons driving their automobiles into Inland Center. They can only attempt to gather signatures elsewhere, such as on public sidewalks, parks and streets adjacent to the center, and in the communities in which the employees and customers of Inland Center reside. Unlike handbills, petitions do not create litter. This Court noted in Lloyd, 407 U.S. at p. 556: "The center . . . had a policy . . . against . . . handbilling, which was considered likely to . . . create litter. . . ." Unlike handbills, which can be distributed by anyone, initiative petitions can only be circulated by registered voters under the authority of the proponents who have paid certain fees and drafted a proposed law. The circulators are highly regulated by state law.

Unlike handbilling, initiative petition circulation is an "all-or-nothing" activity. If the requisite number of signatures is not obtained, the proposed measure does not reach the ballot and the campaign is a total failure. If the distribution of handbills is limited, at least those who receive them obtain the information being disseminated.

This Court in Lloyd was concerned with the possibility that the handbills could be offensive and distracting. Initiative petitions are technical, "legalistic" documents. This Court was concerned with the potential for frequent visits to the center by an unlimited number of persons. In the instant case, however, pursuant to the original California Supreme Court decision, Inland Center adopted regulations regarding the circulation of petitions. Cf. Lloyd Corp. v. Tanner, 407 U.S. at 563, n. 11.

The question unresolved by Lloyd Corp. v. Tanner is whether the decision applies to initiative petitions circulated pursuant to state constitutions under the different circumstances enumerated herein. Did this Court in Lloyd intend its decision to be limited to its facts? This Court stated in the penultimate paragraph:

> "There may be situations where accommodations between them [property rights and First Amendment rights], and the drawing of lines to assure due protection of both, are not easy. But on the facts presented in this case, the answer is clear."
>
> 407 U.S. at 571 (Emphasis added.)

Petitioners herein brought the initiative process under California law to the attention of this Court in Lloyd Corp. v. Tanner by the filing of an amicus curiae brief. Perhaps this Court, in not discussing petition circulation and in expressly limiting its decision to handbilling, intended to leave the issue unresolved in Lloyd.

In the only other case involving initiative petitions circulated pursuant to a state constitution, the Washington Court of Appeal held that under the state constitution reserving to the people the right of the initiative, and under the First Amendment, initiative petitions could be circulated on the premises of privately owned shopping centers. Sutherland v. Southcenter Shopping Center, Inc., 3 Wash. App. 833, 478 P.2d 792 (Ct. App. 1970). The Washington Supreme Court denied a petition for review. The case has not been overruled in Washington.

C. THIS CASE PRESENTS THE COURT WITH AN OPPORTUNITY TO CLARIFY LLOYD CORP. v. TANNER

The precise meaning and significance of Lloyd Corp. v. Tanner has been widely questioned since the case was decided on June 22, 1972. Indeed, the four dissenting justices of this Court expressed their doubts by wondering whether the majority had implicitly overruled Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968) and Marsh v. Alabama, 326 U.S. 501 (1946).

Cases decided subsequent to Lloyd Corp. v. Tanner have contributed to the confusion and uncertainty. In Police Department v. Mosley, 408 U.S. 92 (1972) and Grayned v. City of Rockford, 408 U.S. 104 (1972) this Court invalidated ordinances which permitted labor picketing but prohibited other peaceful picketing. This Court stated the Fourteenth Amendment was violated because an impermissible distinction was made between the two types of picketing. Yet, this Court has, in effect, made such a distinction by apparently ruling that labor picketing on shopping centers is permissible under Logan Valley but nonlabor picketing is not, under Lloyd.

Additional questions concerning the current vitality of Lloyd have been raised by this Court's decision in Steffel v. Thompson, ___ U.S. ___, 39 L. Ed. 2d 505 (1974). Steffel generally involved the appropriateness of the utilization of federal declaratory relief to determine the constitutionality of state statutes. In particular, the plaintiff asserted a constitutional right to distribute handbills on the premises of a privately owned shopping center. He asked the district court to declare unconstitutional the application of a state trespass law to conduct he sought to engage in. This Court held that federal declaratory relief is not precluded when no state criminal prosecution is pending and a plaintiff demonstrates a genuine threat of enforcement of a disputed criminal statute, whether an attack is made on the constitutionality of the statute on its face or as applied.

Steffel v. Thompson is significant in its failure to state that the conduct described therein was absolutely barred by Lloyd. If Lloyd absolutely forbids First Amendment conduct on the premises of privately owned shopping centers, this Court would not have reached the merits (procedural merits) of the case. Throughout its opinion, this Court acknowledges that for declaratory relief to be rendered there must be a continuing controversy:

> "Nonetheless, there remains a question as to the continuing existence of a live and acute controversy that must be resolved on the remand we order today.[10] . . . Here petitioner's complaint indicates that his handbilling activities were directed 'against the war in Vietnam and the United States foreign policy in Southeast Asia.' Since we cannot ignore the recent developments reducing the Nation's involvement in that part of the world, it will be for the District Court on remand to determine if subsequent events have so altered petitioner's desire to engage in handbilling at the shopping center that it can no longer be said that this case presents 'a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of declaratory judgment.'"
>
> 10. The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. . . ."

The concurring justices also recognized as significant the continuing nature of the controversy. Mr. Justice Stewart, with whom the Chief Justice concurred, after indicating that he joined the opinion of the Court, stated, 39 L. Ed. 2d at 524:

> "The petitioner in this case has succeeded in objectively showing that the threat of imminent arrest, corroborated by the actual arrest, of his companion, has created an actual concrete controversy between himself and the agents of the state. He has, therefore, demonstrated 'a genuine threat of enforcement of a disputed state criminal statute. . . .*
>
> *. . . Whether, in view of 'recent developments,' the controversy is a continuing one, will be for the District Court to determine on remand."

Steffel makes it clear that this Court deemed the controversy a continuing one. Such a finding is inconsistent with the view that Lloyd absolutely bars such conduct at the shopping center. If Lloyd were dispositive, this Court would have necessarily determined that there was no continuing controversy, and, therefore, that the plaintiff in Steffel could not prevail.

Uncertainty as to the precise meaning of Lloyd has also been expressed by various law review commentators. See The Supreme Court, 1971 Term, 86 Harv. L. Rev. 52, 122; Lloyd Corp. v. Tanner: A Shopping Center Open For Business But Not For

Dissent, 25 Maine L.Rev. 13; Free Speech In The Marketplace--Accommodating "Speech Plus" Activity and Property Rights, 44 U. of Cal. L. Rev. 259; Shopping Centers And The "Quasi-Public" Forum, 51 N. Car. L. Rev. 123.

Uncertainty as to the precise meaning of Lloyd is apparent from an examination of the opinions below. The California Supreme Court split four-to-three on the meaning of Lloyd, and the Court of Appeal split two-to-one. Indeed, the dissenter in the Court of Appeal, Justice Tamura, was with the majority prior to Lloyd.

This Court's opinion in Lloyd has created uncertainty in the Oregon Supreme Court. Six justices of the Oregon Supreme Court recently produced four opinions in an attempt to understand Lloyd and determine its applicability to a case involving religious activity on a shopping center in Portland. See Lenrich Associates v. Heyda, 504 P. 2d 112 (Ore. 1972). Only three of the six justices agreed with the views expressed by the four justices of the California Supreme Court. Justice Holman, concurring in Lenrich, stated,

> "It is impossible to read Lloyd v. Tanner and be certain . . . . [N]o one can be certain of the intention of the Supreme Court of the United States until the opinion is clarified."
> 504 P. 2d at 118-119.

Chief Justice O'Connell in dissenting stated that the Oregon Constitution protected the defendants who were sued by the shopping center, 504 P. 2d at 119.

It appears that even the shopping centers in Lloyd and in the instant case were or are confused as to the real issue in this sort of litigation. This is apparent from reading the "Question Presented" in their respective petitions filed with this Court. In the instant case, when respondent Homart Development Co. was seeking review of the first Diamond v. Bland decision of the California Supreme Court, respondent Homart phrased the question as follows:

> "May the owner of a shopping center be compelled, in derogation of his Fifth Amendment property rights, to have part of his private commercial property confiscated for the use of those who wish to engage in any free speech activities thereon notwithstanding that (1) the activities are unrelated to any business of the center and (2) there are effective alternative locations in which to engage in such activities?"
>
> Petition For A Writ of Certiorari, Homart Development Co. v. Diamond, October Term, 1970, No. 1469, p. 2.

Instead of viewing the issue from the Fifth Amendment point of view, Lloyd Corporation, Ltd., in petitioning for certiorari, stated the question from the First Amendment perspective:

> "Does the First Amendment require the petitioner, as the owner of a shopping center, to open its land to all noncommercial handbilling even though the purpose of the handbilling is not related to the

> petitioner's use of the land or to any activity being conducted thereon, and use of the petitioner's land is not necessary to accomplish the purpose of the handbilling?"
>
> Petition For A Writ of Certiorari, Lloyd Corp., Ltd. v. Tanner, October Term, 1971, No. 71-492, p. 2.

Finally, this Court's refusal four times to review the initial Diamond v. Bland decision of the California Supreme Court, while granting certiorari in Lloyd Corp. v. Tanner, has raised doubts about the meaning and significance of Lloyd Corp. v. Tanner.

To resolve this uncertainty regarding a major nationwide issue involving a fundamental right guaranteed by the constitutions of twenty-one states, this Court should grant certiorari in the instant case.

D. THIS CASE PRESENTS THE COURT WITH AN OPPORTUNITY TO DEFINE THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES

No case ever considered by this Court has involved the circulation of petitions to enact legislation. While this Court has, on an infrequent basis, mentioned the right to petition the government for a redress of grievances, e.g., California Transport v. Trucking Unlimited, 404 U.S. 508, 510 (1972); Eastern Railroad Conference v. Noerr Motor Freight, 365 U.S. 127, 137 (1961), it has never done so in a case involving "real" petitioning, that is, the circulation of petitions. See,

e.g., Johnson v. Avery, 393 U.S. 483 (1969); Schneider v. Smith, 390 U.S. 17 (1968); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); United Mine Workers v. Pennington, 381 U.S. 657 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963); Bates v. Little Rock, 361 U.S. 516 (1960); Thomas v. Collins, 323 U.S. 516 (1945); Ex parte Hull, 312 U.S. 546 (1941); De Jonge v. Oregon, 299 U.S. 353 (1937); United States v. Cruikshank, 92 U.S. 542 (1875). None of these cases involved "true" petitioning, although they contain discussion of the right to petition the government for a redress of grievances.

This Court should decide whether the First Amendment's protection of the right to petition includes the actual circulation of petitions, which necessarily involves conduct. In some "free speech" cases, this Court has analyzed the issue as involving "speech plus" conduct. This Court has, in effect, isolated "speech" from "conduct," apparently holding that only pure speech is afforded First Amendment protection, not the "nonspeech" element. See California v. La Rue, 409 U.S. 109, 117-118 (1972) and United States v. O'Brien, 391 U.S. 367, 376 (1968).

Unlike "pure speech" protected by the First Amendment, which does not necessarily involve conduct, the petitioning of the government, by definition, involves conduct. In other words, the First Amendment itself protects the physical activity involved in the circulation of petitions. Without the ability to circulate petitions, the right to petition

the government is meaningless. Of course, there must be access to those who wish to sign petitions. This activity necessarily involves a "two-way" process. The circulator and the signer must communicate. A pen or pencil must be used. Petitioners herein respectfully submit that because of the physical requirements attendant upon the circulation of petitions, more consideration must be given to those who circulate petitions than to those who merely distribute handbills, when a balancing test is employed, such as in the case of Lloyd v. Tanner and in the instant case.

Certiorari should be granted so that this Court may resolve the issue as to whether the circulation of petitions is entitled to more weight than the mere distribution of handbills. This Court has never decided a case involving the circulation of petitions.

E. THE DECISION BELOW VIOLATES PETITIONERS' FIRST AMENDMENT RIGHTS

This Court said in Eastern R.R. Conference v. Noerr Motor Freight, 365 U.S. 127, 138 (1961), "The right of petition is one of the freedoms protected by the Bill of Rights . . . ." In Edwards v. South Carolina, 372 U.S. 229 (1963), this Court stated that the right to petition guaranteed by the First Amendment is applicable to the states via the Fourteenth Amendment, and that the right includes the right to petition a state government.

In ruling against petitioners below, the California courts have failed to protect petitioners' precious rights under the First Amendment. If there is a hierarchy of First Amendment rights, which may include, perhaps, such activity as nude dancing, California v. La Rue, supra, and the public display of a "four letter word," Cohen v. California, 403 U.S. 15 (1971), certainly the circulation of petitions for the purpose of enacting legislation must be placed at the top of the First Amendment "scale." There is no greater fundamental right. That is the central purpose of the First Amendment. This Court stated in Stromberg v. California, 283 U.S. 359, 369 (1931):

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."

Indeed, petitioners submit that the process of direct legislation by state citizens is even more fundamental than their attempt, through speeches, associations, letter writing, and other similar means, to persuade their elected representatives to enact laws. The initiative process is a vital part of the legislative process. Cf. United States Constitutuion, Article IV, Section 4:

> "The United States shall guarantee to every State in this Union a

Republican Form of Government . . . ."

In analyzing petitioners' First Amendment contentions this Court should examine the whole record, Edwards v. South Carolina, 372 U.S. 229 (1963). Analysis of the entire record will demonstrate the deprivation of petitioners' First Amendment rights.

F. THE DECISION BELOW ERRONEOUSLY CONCLUDED THAT THE CIRCULATION OF INITIATIVE PETITIONS PURSUANT TO A STATE CONSTITUTION ON SHOPPING CENTER PROPERTY PREVIOUSLY CHARACTERIZED BY STATE LAW, UNDER REGULATIONS PROMULGATED BY THE SHOPPING CENTER, VIOLATED THE SHOPPING CENTER'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS

Without considering the differences between initiative petition circulation on the one hand, and handbilling on the other, the California Supreme Court purported to follow this Court's decision in Lloyd Corp. v. Tanner. The California Supreme Court followed the trial court's conclusion that, "as a matter of law, there are necessarily effective alternative means of communication where non-related use is sought to be engaged in on private property."

The California Supreme Court failed to engage in the balancing process which this Court required in Lloyd. If the proper balance were struck, petitioners would prevail. The Fifth and Fourteenth Amendments were not the basis of this Court's decision in Lloyd. Indeed, in

the "Question Presented," upon which this Court's jurisdiction to consider the case was based, petitioner Lloyd Corp. articulated the issue from the First Amendment point of view. Necessarily, this Court must have only held that the First Amendment did not grant the handbillers the right to conduct their activities on the premises of Lloyd Center.

In construing Lloyd Corp. v. Tanner as a Fourteenth Amendment case, the California Supreme Court erred. The court also erred in its refusal to consider the numerous significant factual distinctions between Lloyd and the instant case, already previously set forth in this petition.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

ROGER JON DIAMOND
15415 Sunset Boulevard
Pacific Palisades
California 90272

Attorney for Petitioners.

CERTIFICATE OF SERVICE

I, Roger Jon Diamond, declare as follows: I am an attorney at law duly admitted to practice before the Supreme Court of the United States, and I am the attorney for petitioners.

On 8/5, 1974, pursuant to Rule 33 of the Supreme Court Rules, I caused the within Petition for Writ of Certiorari to be served on all respondents, the California Supreme Court, the California Court of Appeal, Fourth Appellate District, the San Bernardino County Superior Court, and on California Secretary of State Edmund G. Brown, Jr., amicus curiae in the California Supreme Court, and the American Civil Liberties Union of Southern California, amicus curiae in the California Supreme Court, by placing three copies thereof enclosed in a sealed envelope with first class postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Court of Appeal
Fourth Appellate District
640 State Building
303 West Third Street
San Bernardino, Calif. 92401

V. Dennis Wardle, Clerk
San Bernardino Superior Court
351 North Arrowhead Avenue
San Bernardino, Calif. 92401

Lonergan, Jordan,
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Sacramento, Calif. 95814

California Supreme Court
350 McAllister Street
San Francisco, Calif. 94102

I further certify that all parties required to be served have been served

I declare under penalty of perjury
that the foregoing is true and correct.

Roger Jon Diamond

Roger Jon Diamond

15415 Sunset Boulevard
Pacific Palisades
California 90272

AUG 8 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-97

ROGER JON DIAMOND; WILLIAM DUXLER; and PEOPLE'S LOBBY, INC.,

Petitioners,

vs.

FRANK BLAND, Sheriff of San Bernardino County; LOUIS J. FORTUNA, Chief of Police of City of San Bernardino; LOWELL E. LATHROP, District Attorney of San Bernardino County; James LAMBERT; C.H. BARRET; AL C. BALLARD, Mayor of City of San Bernardino; and HOMART DEVELOPMENT COMPANY,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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PEOPLE'S LOBBY PRESS, LOS ANGELES

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IN THE

Supreme Court of the United States

October Term, 1974

No.

ROGER JON DIAMOND; WILLIAM DUXLER; and PEOPLE'S LOBBY, INC.,

Petitioners,

vs.

FRANK BLAND, Sheriff of San Bernardino County; LOUIS J. FORTUNA, Chief of Police of City of San Bernardino; LOWELL E. LATHROP, District Attorney of San Bernardino County; James LAMBERT; C.H. BARRET; AL C. BALLARD, Mayor of City of San Bernardino; and HOMART DEVELOPMENT COMPANY,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

APPENDIX A.

Constitutional and Statutory Provisions Involved.

UNITED STATES CONSTITUTION:

Amendment I:

"Congress shall make no law . . .

abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment V:

"No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV:

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CALIFORNIA CONSTITUTION:

Article I, Section 9:

"Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.

Article I, Section 10:

"The people shall have the right to

freely assemble together to consult for the common good, to instruct their representatives, and to petition the Legislature for redress of grievances."

Article IV, Section 1:

"The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum."

Article IV, Section 22:

"(a) The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.

"(b) An initiative measure may be proposed by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed by electors equal in number to 5 percent in the case of a statute, and 8 percent in the case of an amendment to the Constitution, of the votes for all candidates for Governor at the last guvernatorial election.

"(c) The Secretary of State shall then submit the measure at the next general election held at least 131 days after it qualifies or at any special statewide election held prior to the general election. The

Governor may call a special statewide election for the measure.

"(d) An initiative measure embracing more than one subject may not be submitted to the electors or have any effect."

STATE OF CALIFORNIA PENAL CODE, SECTION 602:

"Every person who willfully commits a trespass by any of the following acts is guilty of a misdemeanor:

* * *

(1) Entering and occupying real property or structures of any kind without the consent of the owner, his agent, or the person in lawful possession thereof."

CITY OF SAN BERNARDINO ORDINANCE NO. 2491 (September 10, 1968):

* * *

Section 1. . . . Any person other than a public officer or employee acting within the course and scope of his employment, who enters or remains upon any automobile parking lot, drive-in property or any other place or property open to the public, without the implied or express consent of the owner, his agent or person in lawful possession thereof, or with knowledge that such consent has been withdrawn, is guilty of a misdemeanor. . . .

* * *

APPENDIX B

OPINION OF THE CALIFORNIA SUPERIOR COURT NOVEMBER 14, 1969

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
For the County of San Bernadino.

ROGER JON DIAMOND, et al., etc., *Plaintiffs,*
vs.
FRANK BLAND, et al., etc., *Defendants.*
No. 149671.

REPORTER'S TRANSCRIPT OF PROCEEDINGS.

Before HON. JAMES E. CUNNINGHAM, SR., *Superior Court Judge,*

Department X. San Bernadino, California.

November 14, 1969.

The Court: Gentlemen, as we all know, for the past fifty years there has been a constant erosion of property rights. First of all, in favor of public rights such as health and safety laws. Next, licensing ordinances and after that zoning ordinances. For the past fifteen years there has been a considerable amount of decisional law diminishing property rights in favor of personal or individual rights including First Amendment Rights as have been referred to. But in all of the cases determining the validity of of these erosionary laws on property rights, the Court of

necessity has had to balance the equities, so to speak, had to weigh the prejudice to the property right to the greater gain of the public or individual right.

As the law now stands many, many things are permitted on what is public property: Demonstrations, solicitations, passing out of leaflets. Of course, the first was the picket line in front of private property. How, many of these things merchants would like to be free of, many of these restrictive type things. Consequently, merchants have invested tremendous sums of money for leasehold interests in order to carry out what the Court feels is the moral obligation of the merchant to protect his customer from annoyance or harassment, jostling. In other words, he has a need to afford comfort to his prospective customer. Many merchants have found that when they locate their businesses contiguous to public property, they cannot do these things they would like to do for the comfort and well being of the customer and that is the reason, in great measure, that the shopping center movement has been so great in the post-Korean years. Plus the fact that the Court takes judicial knowledge that urban areas have been blighted. It is difficult for any one merchant to improve appreciably his place of business because he doesn't know what his neighboring business people will do or whether they will also invest the money. So what with the blighting of the urban area, their deterioration, the more permissiveness of conduct on the public sidewalk and street that is injurious to his business, so he feels, has caused him to band together with his other merchants and move into a completely privately owned shopping center. Evidently, though, when it came to a strike dispute, the merchant wasn't able to get away with his private property argument. In the Logan case the pickets were permitted on private property, shopping center property, but there the Court was very careful to point out that there was a privy, there was a causal connection between the permitting

of the pickets and the diminution of private property rights because it was the only way that the union in exercising its heretofore established right to picket, could point out the alleged offending employer. The Court gave no indication that for any other purpose it would tear down or destroy the last vestiges of the capitalistic system and also a constitutional right to have the peaceful enjoyment of real property or leasehold interest therein.

In our case at Bar, the Court is of the opinion that the Logan decision of the United States Supreme Court has no applicability because I find no privy between the plaintiff in his attempt to induce the merchants' customers to sign his petition as having any relationship whatsoever with the merchants' right to do business.

The shopping center has demonstrated its ability to operate a more desirable entity for the conduct of mercantile business by virtue of the acceptance it has received from the public. The Court heard evidence today and took judicial knowledge of the fact that one of the greatest people getters in San Bernardino County was the Shopping Center and why are the people going to the shopping center in such droves? A partial reason is that there is some redevelopment taking place in what was formerly the downtown section of San Bernardino but that isn't the sole reason. The people are traveling, according to the testimony, from a hundred miles away, from Barstow and they are coming down because the shopping public, first of all, wants value for the shopping dollar and wants and has demonstrated its desire for an environment to shop in that is pleasant, clean and interesting. I might even say entertaining because promotions have evidently been popular because of their multiplicity. So, in our case when the Court balances the prejudice to be done to the merchant as against the gain to be obtained by the plaintiff, I feel the greater weight is on the side of the defendants.

In concluding, let me give you the Court's answer to one thing that was pointed up here during the trial and that is, to wit: The plaintiffs First Amendment Rights, the right to circulate a petition in accordance with the law providing for the initiative is being denied him because unless he can get into the shopping center where he can meet large crowds of people, he cannot complete his petition within the time prescribed by law to complete it.

Well, gentlemen, we have a Legislature in the State of California that is fully attuned, in my opinion, to the wishes and the desires of the people. If the shopping centers, because petitions could not be circulated there, were preventing the initiative from being effective and which it always should be because that is a great American right that we have, then, I would say we should prevail upon the Legislature to extend the time within which to collect the signatures so that they might be obtained where the Courts have already determined petitions might be circulated and signatures obtained. That would take thirty days or sixty days longer to do it on public property such as the street corner. Change the law if necessary but don't infringe again on another property rights that have in the past ten years, as I initially stated, suffered tremendous erosion.

The prayer of the petition for temporary injunction denied as to all named defendants. Both parties to bear their own costs. The Court will be in recess.

Mr. Gresham: Thank you, your Honor.

The Court: Gentlemen, since making my order denying the request for the temporary injunction I understand you have had some conversation and wish to enter into a stipulation?

Mr. Diamond [for Plaintiffs]: Yes, your Honor. The stipulation will be that your order covers both the application for the preliminary injunction as well as the permanent

injunction and that your order was denial of both applications and that the order is final for purposes of an appeal.

The Court: Do you join in the stipulation?

Mr. Gresham [for Defendant Homart Development Co.]: Yes, your Honor.

The Court: The other two attorneys are not present but I think you might agree that they are not the real parties in interest as is the shopping center per se and the plaintiffs.

APPENDIX C

FINDINGS OF FACT AND CONCLUSIONS OF LAW DECEMBER 5, 1969

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

ROGER JON DIAMOND, WILLIAM DUXLER, PEOPLE'S LOBBY, INC., Plaintiffs, vs. FRANK BLAND, SHERIFF OF SAN BERNARDINO COUNTY, et al., Defendants.	No. 149671 FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed December 5, 1969)

The application of the plaintiffs for a preliminary injunction having come on for hearing pursuant to an Order to Show Cause issued by this Court and plaintiffs Roger Jon Diamond, William Duxler and People's Lobby, Inc., appearing by Roger Jon Diamond, Esq., and defendants Frank Bland, Sheriff of San Bernardino County and Lowell E. Lathrop, District Attorney of San Bernardino County, appearing by Paul A. Grube, Jr., Deputy County Counsel; and Louis J. Fortuna, Chief of Police of the City of San Bernardino and Al C. Ballard, Mayor of the City of San

Bernardino, appearing by Ralph Prince, City Attorney; and James Lambert, C. H. Barrett and Homart Development Co., a corporation, appearing by Lonergan, Jordan & Gresham by Allen B. Gresham, Esq. and no service having been made on Sears, Roebuck and Company, a corporation, or any fictitiously named defendants, two of whom the evidence showed to be the May Company, a corporation, and the Broadway-Hale Stores, Inc., a corporation, and no voluntary appearance having been made by any of said corporations, and oral and documentary evidence having been introduced by all parties and the matter having been argued to the Court and memoranda having been submitted thereon, and the Court having considered the same, and having issued its Order denying the application for preliminary injunction and the parties thereafter having stipulated that said Order shall apply to both the application for the preliminary injunction and also for the permanent injunction and that the order of denial on both applications shall in all respects be a final order, and pursuant to request by plaintiffs therefor, the Court now issues the following Findings of Fact:

FINDINGS OF FACT

1. Roger Jon Diamond, with two other persons, filed two initiative petitions relating to environmental pollution, with the Attorney General of the State of California, pursuant to the California Elections Code. On August 28, 1969, the Attorney General prepared and returned to Roger Jon Diamond and the other two proponents the official summary for each

of the two initiative petitions. On August 28, 1969, Roger Jon Diamond, through the assistance of volunteers and with the guidance and support of the People's Lobby, Inc., began soliciting signatures of registered voters on the two initiative petitions. Copies of the subject petitions are attached to the Complaint as Exhibits "B" and "C."

2. At all times mentioned herein, People's Lobby, Inc., was and is a non-profit California Corporation. People's Lobby, Inc., has been, and is, the sponsor and organization supporting and guiding the initiative campaign.

3. At all times mentioned herein, William Duxler and Thomas Rentz have been and are acting as soliciting agents for Roger Jon Diamond, the other two proponents, and People's Lobby, Inc.

4. Frank Bland is and at all times mentioned in the Complaint was, the Sheriff of San Bernardino County.

5. Louis J. Fortuna is and at all times mentioned in the Complaint was, C Chief of Police of the City of San Bernardino.

6. Al C. Ballard is and at all times mentioned in the Complaint was, the Mayor of the City of San Bernardino.

7. Lowell E. Lathrop is and at all times mentioned in the Complaint was, the District Attorney of San Bernardino County.

8. C. H. Barrett is and at all times mentioned in the Complaint was, a Security

Guard for defendant Homart Development Co.

9. James Lambert is and at all times mentioned in the Complaint was, an employee of Homart Development Company and the General Manager of the Inland Shopping Center, San Bernardino, California.

10. Homart Development Company is and at all times mentioned in the Complaint was, a corporation doing business in the State of California and the County of San Bernardino as hereinafter set forth, and conducts similar operations throughout the entire nation.

11. Homart Development Company, Sears, Roebuck and Company, the May Company, Broadway-Hale Stores, Inc., are and at all times mentioned in the Complaint were, owners and operators of portions of the Inland Center, San Bernardino, California. Each has control of and operates its own portion as specifically set out in Exhibit "F."

12. Inland Center is a large shopping center located on a wedge shaped piece of property, one boundary of which is Interstate Highway 15, another side fronting on a heavily travelled surface road and the rounded side being bounded by a flood control channel. The entire property area is surrounded by a chainlink fence, except for the various entrances. Exhibit "B" depicts the area of the Center together with the surrounding land. The Inland Center is located in the southern part of the City of San Bernardino and is surrounded by commercial and business development. It is removed from any

residential area.

13. The building located on the subject property is a totally covered, air conditioned shopping complex consisting of three major stores, Sears, Roebuck and Company, the May Company and Broadway-Hale Stores, Inc., together with seventy-two "tenant" stores all of which front on the enclosed "mall" or "common aisleway." There are three kiosks, or leased booths located in the common aisleway. The entire building is surrounded by a large parking area. See Exhibit "C."

14. The Center is a "Fashion Center" carrying high quality merchandise. The common aisleway on which the tenant shops open is thirty-two feet wide. Thousands of persons shop and visit the Inland Center every day. They come from a market area of approximately one million people living in areas as far from the Center as seventy-five miles. The public is welcome on the premises when they use the property for purposes consistent with the use to which the Center is put. The Inland Center is the largest shopping center in the County of San Bernardino. There is no admission price for the covered mall area. No representative of Inland Center checks persons at the various entrances to the covered mall. It is not a requirement of entrance that a person purchase anything. Members of the public are encouraged to visit Inland Center and walk through the covered mall area even though they may not make a purchase. Exhibit "E" depicts the interior of the building and the common aisleway.

15. The building has a sidewalk approximately six to eight feet in width on most sides. The front of the building has such a sidewalk and immediately adjacent to it is a passage area for two-way vehicular traffic. This passage way is heavily travelled. See Exhibits "B" and "C."

16. The entire Inland Center property is private property owned by the companies mentioned above. On the chainlink fence and at each entrance there are "No Trespass" signs indicating that it is private property and admission is subject to revocation. See Exhibit "G." Each night at either 10:00 p.m. or 11:00 p.m., depending on the day of the week, the Inland Center Building is completely locked and access is denied to everyone.

17. Under the terms of a "Reciprocal Easement Agreement" entered into by the four land owners, Homart Development Co. is charged with the management and operation of the enclosed portion or common aisleway of the subject building together with all the tenant operations. The expense for all the common area, including Homart's portion of the parking lot, is borne by the tenants in various ratios depending on the size of their store. See Exhibit "I."

18. Pursuant to the Election Code, all initiative petitions must be signed, precincted and filed with the County Clerk's office of each county of the State in which the signatures are gathered, by November 26, 1969. One petition, marked Exhibit "B" and attached to the Complaint, requires the signatures of at least

520,276 registered California voters, and the other, Exhibit "C", requires 325,173 signatures, in order to qualify for the June, 1970 or November, 1970 State Election.

19. If either or both petitions fail to gather the required number of signatures, supplemental petitions may be filed by January 26, 1969, but no later, in order for the two matters to appear on the November, 1970 State Ballot.

20. On October 28, 1969, Trish Geddes, an initiative petition circulator and organizer, telephoned James Lambert and asked him for permission to solicit signatures for the initiative petitions and disseminate information in connection therewith on the parking lot and common aisleway area of the Inland Center. Trish Geddes advised James Lambert that signatures would be gathered in an orderly fashion. James Lambert refused.

21. On October 29, 1969, William Duxler telephoned James Lambert and again requested permission to solicit signatures for the initiative petitions and disseminate information in connection therewith on Inland Center property. Permission was refused.

22. On October 29, 1969, after talking to James Lambert by telephone, William Duxler visited the Inland Center and discussed the situation with Robert A. Moor, Promotion Manager for Inland Center. William Duxler again requested permission to solicit signatures for the petitions and disseminate information in connection therewith and was refused by Robert A.

Moor. William Duxler advised Robert A. Moor that legal action would be instituted to establish the first amendment rights of persons to engage in such activities on shopping center property.

23. On October 30, 1969, at approximately 7:45 p.m., William Duxler and Tom Rentz, representing People's Lobby, Inc., and a photographer and reporter from the Highlander, the student newspaper of the University of California, Riverside, went to the Inland Center, set up a standard size card table at a point near the junction of the two common aisleways between the Gingerbread House and the Village Card and Gift Shop. See Exhibit "C" and certain portions of Exhibit "E." They began soliciting signatures for the petitions, disseminating information in connection therewith and collecting donations.

24. After a few signatures had been gathered, C. H. Barrett saw the crowd gathered around the table and approached Mr. Duxler. Acting within the course and scope of his employment as an employee of Homart Development Co., he picked up the petitions from the card table, handed them to Mr. Duxler and directed him and Mr. Rentz to leave the premises of the Inland Center immediately. Thereafter, Mr. Duxler and Mr. Rentz left the common aisleway area of the enclosed mall and resumed the solicitation of signatures at a point on the sidewalk immediately outside one of the entrances to the enclosed mall. Again Mr. Barrett requested that they leave the premises of the Inland Center. Mr. Barrett's instructions would

have required the same conduct on his part had Mr. Duxler and Mr. Rentz not been soliciting funds and only attempting to gain signatures on the subject petitions and disseminate information in connection therewith, and regardless of where on the Homart premises such activity occurred. Although no City official or law enforcement agency was involved in either the incident in the common aisleway or outside on the sidewalk, had Messrs. Duxler and Rentz not left when asked to do so, Homart would have summoned help with the request that San Bernardino City Ordinance 2941, a "no trespass" ordinance, be enforced.

25. Homart Development Co. and the remaining owners, under the terms of the Reciprocal Easement Agreement, and all tenants under the provisions of their leases, are prohibited from conducting the kind of activity which plaintiffs seek to perform in the common aisleway area. See Article 27 "Rules and Regulations" of Exhibit "H." The policy discussed herein is nation-wide, well-established and non-discriminatory. This policy was adopted because Homart receives three to four calls each week requesting permission to use the common aisleway for purposes of disseminating information, collecting donations or signatures. These requests come from many worthwhile religious and charitable organizations such as churches, fraternal orders, the United Fund, Salvation Army, political candidates (including presidential, Congressional, State and local) and others. When persons have appeared on the subject property without asking permission, they have been asked to leave immediately upon

discovery.

26. The policy mentioned above was adopted to avoid congestion in the common aisleways, to prevent disruption of or interference with the customers in their dealings with the various merchants, and to avoid having the customers being confronted with matters unrelated to the purposes to which the Inland Center is put.

27. As a proximate result of the policy hereinabove mentioned and the conduct of Homart and its employees, plaintiffs and their agents, and others wishing to solicit signatures from the public for the initiative petitions and disseminate information in connection therewith on the premises of Inland Center, or engage in the same use of the Center premises in connection with future petitions or similar purposes, will be prevented from doing so.

28. There are many alternative sites and techniques available to plaintiffs. It is possible to conduct the subject activities on the public sidewalks of San Bernardino, in its parks, public buildings, at houses of worship, entertainment centers, athletic contests, at many factories in and around San Bernardino and near its many military installations. Contact can also be had with the public through newspapers (See Exhibit "D" to the Complaint), radio, telephone, door-to-door, mailings. Some of these sites or techniques are ineffective, others are too costly, but some have never been tried. In some cases, arrangements are just being made to implement certain of these

techniques.

29. The private property here concerned has not been devoted to the solicitation of signatures, the solicitation of donations, or the dissemination of information in connection therewith.

30. There is no privity between Homart, its co-owners and its tenants, and the plaintiffs. There is no dispute between or among these parties, or any of them, nor is the object of the initiative petitions directed toward Homart, its co-owners or its tenants. The petitions have no connection with the subject property and plaintiffs' activities were not intended to benefit Homart, its co-owners and its many tenants, except as they are members of the general public.

31. Homart, its co-owners and its tenants have a right to jointly develop private property and to take such action as is necessary to provide a pleasant, clean, interesting and entertaining environment in which its customers may shop and be free from annoyance, harassment or jostling by persons having no connection with the shopping center. The tenants pay a substantial fee to create and maintain the kind of atmosphere mentioned above.

32. The use sought involved potential obstruction and interference with the use of the property.

33. There is certain activity carried on in the common aisleways in the form of "promotions" but in every instance there is a contractual relationship between

the Homart Development Co. and/or the Merchant's Association (composed of the tenant businessmen) and those carrying on the promotions. The promotions are for the mutual benefit of the contracting parties. In every instance where a promotion is held, it is closely regulated as to time, date, location, number of people or exhibits involved, manner of presentation and security factors.

From the foregoing Findings of Fact, the Court draws the following Conclusions of Law:

CONCLUSIONS OF LAW

1. The defendants have a constitutional right to a peaceful enjoyment of private real property or a leasehold interest therein.

2. The plaintiffs have no constitutional right to use the common aisleways in the covered mall of the Inland Center for the purposes for which they sought to use them nor to enter upon such property in order to solicit signatures.

3. The plaintiffs have no constitutional right to use the exterior of the building including the sidewalks and parking areas of the Inland Center for the purposes for which they sought to use them nor to enter upon such property in order to solicit signatures.

4. Both the incident in the common aisleway and the one on the sidewalk occurred on private property which had not been divested of its private character by reason of the use to which it has been put.

5. The application for permanent injunction should be denied.

Let judgment issue in conformity with these Findings of Fact and Conclusions of Law.

Dated: December 5th, 1969.

James E. Cunningham, Sr.,
Judge of the Superior Court

APPENDIX D

JUDGEMENT, DECEMBER 5, 1969

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

ROGER JON DIAMOND, WILLIAM DUXLER, PEOPLE'S LOBBY, INC., Plaintiffs, vs. FRANK, BLAND, SHERIFF OF SAN BERNARDINO COUNTY, et al., Defendants.	No. 149671 JUDGMENT

(Filed December 5, 1969)

The application of the plaintiffs for a preliminary injunction having come on for hearing on November 14, 1969, pursuant to an Order to Show Cause issued by this Court and plaintiffs Roger Jon Diamond, William Duxler and People's Lobby, Inc., appearing by Roger Jon Diamond, Esq., and defendants Frank Bland, Sheriff of San Bernardino County and Lowell E. Lathrop District Attorney of San Bernardino County, appearing by Paul Grube, Jr., Deputy County Counsel; and Louis J. Fortuna, Chief of Police of the City of San Bernardino and Al C. Ballard, Mayor of the City of San Bernardino, appearing by Ralph Prince,

City Attorney; and James Lambert, D. H. Barrett and Homart Development Company, a corporation, appearing by Lonergan, Jordan & Gresham by Allen B. Gresham, Esq. and no service having been made on Sears, Roebuck and Company, a corporation, or any fictitiously named defendants, two of whom the evidence showed to be the May Company, a corporation, and Broadway-Hale Stores, Inc., a corporation, and no voluntary appearance having been made by any of said corporations, and oral and documentary evidence having been introduced by all parties and the matter having been argued to the Court and memoranda having been submitted thereon, and the Court having considered the same, issued its order denying the application for preliminary injunction.

The parties thereafter stipulated that the order denying the application for preliminary injunction shall apply also to the application for permanent injunction and that the order as to both shall in all respects be a final order.

Pursuant to request by plaintiffs, the Court issued its findings of fact and conclusions of law, and good cause appearing therefor;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that no injunction, either preliminary or permanent, shall issue herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs shall take nothing by reason of their complaint herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each party shall bear its

own costs incurred herein.

Dated: December 5th, 1969.

James E. Cunningham, Sr.,
Judge

APPENDIX E

OPINION OF THE CALIFORNIA COURT OF APPEALS, MAY 25, 1970

COURT OF APPEAL, FOURTH DISTRICT.
Second Division
State of California

ROGER JON DIAMOND, et al.,
Plaintiffs and Appellants,
vs.
FRANK BLAND, SHERIFF OF SAN BERNARDINO COUNTY, et al.,
Defendants and Respondents.

4 Civil 10084

OPINION.
(Filed May 25, 1970.)

APPEAL from a judgment of the Superior Court in and for the County of San Bernardino. James E. Cunningham, Sr., Judge. Affirmed.

Roger Jon Diamond for Plaintiffs and Appellants.

Lonergan, Jordan & Gresham, and Allen B. Gresham, for Defendants and Respondents Homart Development Company, James Lambert and C. H. Barrett.

Stanford D. Herlick, County Counsel, and Paul A. Grube, Jr., Deputy County Counsel, for Defendants and Respondents Frank Bland and Lowell E. Lathrop, Sheriff and District Attorney, respectively, of San Bernardino County.

Ralph Prince, City Attorney, for Defendants and Respondents Mayor Al C. Ballard and Chief of Police Louis J. Fortuna of the City of San Bernardino.

Lawrence M. Cohen, by comity, for Defendants and Respondents.

This is an appeal from a judgment denying preliminary and permanent injunctions entered in the Superior Court of San Bernardino County.

All parties agree that this is a case of first impression. It presents the following constitutional question: May the owners of a privately owned shopping center deny the use of their premises to those who desire to use those premises for First Amendment purposes and activities unrelated to the business of the center?

We hold that they may.

Plaintiffs are People's Lobby, Inc., a non-profit California corporation, which at the time of the incident giving rise to this litigation was engaged in securing signatures on two anti-pollution initiative petitions; Roger Jon Diamond, attorney for People's Lobby, Inc; and William Duxler, a volunteer petition carrier for People's Lobby, Inc.

Defendants are Homart Development Company which owns and operates a shopping center in the City of San Bernardino known as the Inland Center; C. H. Barrett, its security guard; James Lambert, its manager; the Sheriff and District Attorney of San Bernardino County and the Mayor and Chief of Police of the City of San Bernardino.

The Inland Center is located in a non-residential area and is bounded by a drainage channel, a six-lane interstate highway and a commercial street. In industry parlance, it is a "regional fashion center" which connotes a shopping center with only "top line stores" which services a large

geographical area. It contains a large parking lot, a totally covered, air-conditioned shopping complex which consists of three major stores—Sears, The Broadway and The May Company—and seventy-two "tenant stores" all of which have an unobstructed front on the covered "mall" or "common aisleway." The complex is surrounded by a six to eight foot wide sidewalk. Adjacent to the sidewalk are heavily traveled driveways and the parking lot.

The covered mall area is open during business hours to customers or those other doing business with the Center by means of entry through unlocked doors. Homart encourages customers to visit the mall in anticipation of increased sales for the tenant shops. It furnishes piped-in music, receptacles and benches on the thirty-two foot wide common aisleways. It forbids the tenant stores from engaging in sales or other activities on the mall aisleways and spends, along with the tenant stores, considerable sums of money to make the mall an attractive and convenient place for customers. Customers are also encouraged to come to the Center by means of promotions and generally unmanned displays conducted in the mall area pursuant to contractual arrangements and closely regulated by Homart as to time, date, location and format.

Under Homart's regulations *all* activity apart from such regulated, mutually beneficial promotions and displays, whether by tenants or strangers, is forbidden on the common aisleways of the mall area. This policy is an integral part of Homart's objective to create a pleasant and attractive area for customers to shop without congestion or interference. This policy is well established and enforced without discrimination. Pursuant to this policy, although the center receives many calls from all varieties of religious, charitable, fraternal and political groups who seek permission to use the Center property, all such forms of solici-

tation, distribution of material and like activity are and have been prohibited on the Center property.

Twenty-five thousand persons per day on the average shop and visit Inland Center. Persons visiting the Center customarily arrive by motor vehicle, drive into the parking lot which has passage ways governed by motor vehicle traffic regulations. At each entrance to the parking lot are "no trespass" signs indicating that it is private property and admission is subject to revocation.

On October 28 and 29, 1969, representatives of Inland Center were asked by representatives of People's Lobby, Inc. for permission to gather signatures for their initiative petition and disseminate information in connection therewith. Although a request for use of the mall area was made, Homart was also asked if the uncovered six to eight foot sidewalk between the structural and the parking lot areas could be used. Both requests were denied. Appellants advised Homart that their activities would be orderly and that they would not obstruct anything although they would like to use a card table to gather signatures, but Homart still rejected their request.

On October 30, 1969, at approximately 7:45 p.m., Duxler and another individual representing People's Lobby, together with a newspaper reporter and a photographer whom Duxler had requested to be present, entered the Center, went into the mall area and set up a standard size card table. There they proceeded to solicit signatures on the initiative petition, disseminate information with regard thereto, pass out bumper stickers, collect donations in a contribution container and affix a sign describing their purpose to the Center directory.

Shortly thereafter, Mr. Barrett, the security officer, observed a crowd of people congregating in the mall and proceeded to investigate the reason therefor. After as-

certaining that Duxler and the other individuals were acting without permission, he requested that they cease their activity and leave the Center. They took down their card table, discontinued their activities and left the mall area, only to resume their activities on the exterior sidewalk. Again, Barrett requested they leave and this time they did.

The entire transaction lasted about half an hour during which time numerous persons signed the petitions. Other than the existence of the table and the activities of Duxler and the other individuals in securing the signatures on the initiative petitions, there was no "disturbance" or "disruption" in the usual sense of the use of those words. Everyone behaved admirably.

While no threat of prosecution was made nor was anyone arrested, the testimony is clear that if plaintiffs had not complied with Barrett's request, he would have reported the matter to Lambert, the Center manager, who, in turn, would have requested police assistance. The Chief of Police, in turn, testified that had his office been called upon, he would have removed persons from the Center at the request of Homart if they were in violation of the City Trespass Ordinance or a State Penal Code section defining trespass.

There were alternative means and locations whereby plaintiffs could have accomplished their desired objectives without utilizing the private property of the Center. The solicitation could have been undertaken on public sidewalks, in public parks, at public buildings, and at entertainment and sporting events. Other communication with the public admittedly could have been had through newspaper media, radio, television, telephone, door-to-door contact, bumper stickers and mailings. However, appellants contend, and we feel that the record substantiates the con-

tention, that these methods are not as desirable or as effective as the use of a shopping center or mall where the public congregates in large numbers on foot.

On November 5, 1969, appellants filed a complaint for injunctive relief (which contained a prayer for declaratory relief) alleging that respondents' refusal to permit them to use the Inland Center premises to solicit signatures on their initiative petitions and disseminate information in connection therewith was in violation of their constitutonal rights. A request for a temporary restraining order was denied, and, after a hearing on November 14, 1969, the request for a preliminary injunction was also denied. The parties then stipulated that the order of the trial court denying the preliminary injunction should also apply to the request for a permanent injunction and a judgment was entered accordingly on December 5, 1969. Notice of appeal was filed by appellants in this court on December 8, 1969.

A threshold question of mootness presents itself.

The parties urge and we agree that the case is not moot.

January 26, 1970, was the deadline for the securing of signatures for plaintiffs' initiative petition. The findings and judgment of the trial court were entered on December 5, 1969. Thus, when the case was before that court, the issues were clearly not moot. However, the time has now passed for the securing of additional signatures and at first blush it would appear that the case is now moot.

Generally, an action which originally was based upon a justiciable controversy cannot be maintained on appeal if all the questions have become moot by subsequent acts or events. The appeal should be dismissed. The reason for this rule is that a reversal in such a case would be without practical effect. (*Eye Dog Foundation* v. *State Board of Guide Dogs for the Blind,* 67 Cal. 2d 536; *Consolidated*

Vultee Aircraft Corp. v. *United Auto etc. Workers,* 27 Cal. 2d 859; *Nomm* v. *Nomm,* 164 Cal. App. 2d 663.)

However, the parties have filed with this court a joint declaration in which they both submit that the case should not be considered moot. In support of this contention, plaintiffs allege that they are presently seriously contemplating other similar campaigns and regard access to Homart's property and that of other similarly situated shopping centers to be essential thereto. In turn, Homart alleges that the Inland Center has frequently been approached by various people seeking to engage in solicitation and related activities, and contends that it can reasonably be anticipated that not only the plaintiffs but numerous other groups will seek to engage in similar activities in the future. Thus, the parties urge that a recurrence of plaintiffs' October 30, 1969 conduct may reasonably be anticipated in the future. Plaintiffs reasonably believe that if they do so, Homart will impose on them what they consider to be an unconstitutional impediment on their exercise of First Amendment free speech rights. On the other hand, Homart reasonably believes that if the plaintiffs press forward with their planned program, it would be placed in the dilemma of either ejecting them as it did in the instant case and thus become subject to similar litigation or doing nothing and thus being deprived of what it believes to be its Fifth Amendment property rights.

Under certain conditions Appellate Courts may entertain a case which subsequent events appear to have made moot. Some of the criteria for this exception to the rule of mootness are:

(1) There is a reasonable likelihood of the same problem recurring between the same two parties giving rise to future litigation on the same subject.

(2) There remain material questions for the court's determination.

(3) Underlying questions persist.

(4) The relief prayed for may encompass future and contingent legal rights.

(5) The parties agree that a finding of mootness would necessitate future litigation, i.e., that a finding of mootness would relegate the parties to the very situation which precipitated the present litigation, a development creating a continuing controversy calling for decision.

(6) That it is likely that the continuing controversy would never be decided on appeal because of the limited time involved in the questioned activity.

(7) That the controversy involves a question of great public interest.

(*Moore* v. *Ogilvie*, 394 U. S. 814 [23 L. Ed. 2d 1, 89 S. Ct. 1493]; *Carroll* v. *President and Commissioners of Princess Anne*, 393 U. S. 175, 178-179 [21 L. Ed. 2d 325, 89 S. Ct. 347]; *Eye Dog Foundation* v. *State Board of Guide Dogs for the Blind, supra*, 67 Cal. 2d 536; *County of Madera* v. *Gendron*, 59 Cal. 2d 798; *Di Giorgio Fruit Co.* v. *Department of Employment*, 56 Cal. 2d 54; *Rattray* v. *Scudder*, 28 Cal. 2d 214; *Jordan* v. *County of Los Angeles*, 267 Cal. App. 2d 794; *Kirstowsky* v. *Superior Court*, 143 Cal. App. 2d 745.)

While all of the above criteria need not exist for a finding against mootness, it is obvious that in this case each of the standards listed do apply. Therefore, we hold that this case is not moot.

Turning to the merits of the case, appellants contend that under applicable case law, they can conduct on respondents' mall and on its sidewalks, driveways and parking lot whatever First Amendment protected activities they could on the public streets of a city—in this case solicit signatures for their petition, disseminate information and collect donations.

Respondents reply that appellants can have the unconsented use of respondents' property only if the manner and purposes sought are consistent with the use to which the property is actually put and then only when there are no alternative effective means of communication readily available.

For an answer to these contentions, it is necessary to trace in some detail the legal history of the use of privately owned shopping centers for First Amendment purposes.

One is first met with the somewhat vague but widely used expression that public streets, highways and parks have been "traditionally" or "from time immemorial" the place for the exercise of First Amendment rights of free speech. However, as Chief Justice Traynor pointed out in *In re Hoffman*, 67 Cal. 2d 845 at 849, the "time immemorial" from which streets and parks had been required to be held open for First Amendment activities really dates from 1939, with the case of *Hague* v. *CIO*, 307 U. S. 496 [83 L. Ed. 1423, 59 S. Ct. 954]. In that case the Supreme Court determined that First Amendment activities on public streets, sidewalks, and parks could be regulated only to the extent necessary to prevent interference with the municipality's interest in protecting the public health, safety or order or in assuring the efficient and orderly use of streets and parks for their primary purpose. The difficulty of fashioning a workable set of rules for even this concept of the exercise of First Amendment rights on public property has produced a number of decisions which have divided the court. (See *Adderley* v. *Florida*, 385 U. S. 39 [17 L. Ed. 2d 149, 87 S. Ct. 242]; *Brown* v. *Louisiana*, 383 U. S. 131 [15 L. Ed. 2d 637, 86 S. Ct. 719]; *Cox* v. *Louisiana*, 379 U. S. 536 [13 L. Ed. 2d 471, 85 S. Ct. 453]; *Edwards* v. *South Carolina*, 372 U. S. 229 [9 L. Ed. 2d 697, 83 S. Ct. 680]; *Jamison* v. *Texas*, 318 U. S. 413

[87 L. Ed. 869, 63 S. Ct. 669]; *Schneider* v. *New Jersey*, 308 U. S. 147 [84 L. Ed. 155, 60 S. Ct. 146].)

Then in 1946 the United States Supreme Court extended this principle to a company-owned town in *Marsh* v. *Alabama*, 326 U. S. 501 [90 L. Ed. 265, 66 S. Ct. 276]. In *Marsh*, all the property interests in the town were held by a single company. However, the town did not function differently from any other town. It consisted of residential buildings, streets, sidewalks, a system of sewers, a sewage disposal plant and a business block in which business places were situated. All were owned by the company. A deputy sheriff, paid by the company, acted as the town's policeman. Merchants and service establishments rented the stores and business places in the business block and the United States Government maintained therein a post office from which mail was delivered to the people of the town. "In short the town and its shopping district are accessible to and freely used by the public in general, and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belonged to a private corporation." (*Marsh* v. *Alabama*, *supra*, 326 U. S. 501, 503 [90 L. Ed. 265, 66 S. Ct. 276, 277].)

Appellant, a Jehovah's Witness, was distributing religious literature on a sidewalk in the business block. She was told to leave, refused, was charged with and convicted of trespass. The Supreme Court reversed the conviction holding that in such a company-owned town appellant's First Amendment rights were the same as though she had been pursuing those rights on a publicly owned sidewalk. The reasoning in *Marsh* is clear. Since *all* of the property was owned by the company, *any* use of the company-owned streets and sidewalks was the equivalent of engaging in such activity on publicly owned streets and sidewalks in an ordinary town. In other words, it was held to

be proper to carry out *any* First Amendment protected activities on the privately owned streets of a company-owned town that could be carried out on the publicly owned streets of an ordinary town. While the language of the case does not use the exact expression "the lack of alternative effective means of communication," the facts of the case and the holding make it clear that this concept loomed large in the opinion. In a company-owned town there are no alternative effective means of man-to-man communication—by word of mouth, handbills, placards, etc. Were the company-owned town to deny *all* First Amendment rights on its streets and public places, the inhabitants would have nothing but radio, television (not very potent in 1946), mail and newspapers (assuming the landowner allowed newspaper sales and delivery) by which communication on matters of public interest could be brought to the attention of the inhabitants.

Then in 1964 the Supreme Court of this State decided the landmark case of *Schwartz-Torrance Investment Corp.* v. *Bakery and Confectionery Workers' Union*, 61 Cal. 2d 766. In this case, the court held that the owners of a shopping center could not enjoin as a trespass a union's peaceful *picketing* of premises leased by an employer from the owners of the shopping center. The court concluded that the union's interest in picketing outweighed the property owner's interest in "vindicating a theoretical invasion of its right to exclusive control and possession of private property." (*Schwartz-Torrance Investment Corp.* v. *Bakery and Confectionery Workers' Union, supra*, 61 Cal. 2d 766, 772.)

While *Schwartz-Torrance* cited *Marsh* for the general principle of "the diluted nature of a property right in premises open to the public" (*Schwartz-Torrance, supra*, p. 771), the case was decided primarily upon labor relations law and on a public policy favoring concerted activities of

employees for the purpose of collective bargaining. (Labor Code, § 923; *Messner* v. *Journeymen Barbers etc. International Union*, 53 Cal. 2d 873; *Shafer* v. *Registered Pharmacists' Union*, 16 Cal. 2d 379.) The preferential status of picketing under our laws weighed heavily with the court in *Schwartz-Torrance*. In other words, *Schwartz-Torrance* was and is a *picketing* case and the language of that case should not be extended beyond the factual situation presented therein.

The case in which appellants place their primary trust is *Amalgamated Food Employees' Union, Local 590* v. *Logan Valley Plaza, Inc.*, 391 U. S. 308 [20 L. Ed. 2d 603, 88 S. Ct. 1601], decided in 1968. Here the principles of *Marsh* were extended from a company-owned town to an ordinary shopping center *in a picketing case.* The court held that for the purposes of that case an ordinary shopping center was the functional equivalent of a community business block and for First Amendment purposes *as reflected by picketing and handbilling in a labor dispute involving places in the shopping center*, it was to be treated in the same manner.

However, *Logan Valley* specifically failed to resolve the question of whether it was necessary that First Amendment protected activities to be carried out on a shopping center have a causal connection or be directly related to the purpose to which the shopping center property was being put. The court stated (391 U. S. at p. 319, 88 S. Ct. 1609), "All we decide here is that because the shopping center serves as the community business block 'and is freely accessible and open to the people in the area and those passing through,' *Marsh* v. *State of Alabama*, 326 U. S. at 508, 66 S. Ct. at 279, the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises *in a manner and for a purpose*

generally consonant with the use to which the property is actually put." [Emphasis added.] The court follows that statement with footnote 9 on the same page, which reads: "The picketing carried on by petitioners was directed specifically at patrons of the Weis Market located within the shopping center and the message sought to be conveyed to the public concerned the manner in which that particular market was being operated. We are, therefore, not called upon to consider whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was *not thus directly related in its purpose to the use to which the shopping center property was being put.*" [Emphasis added.]

In 1969, the Supreme Court of this State in *In re Lane*, 71 A. C. 911, *a picketing case,* carried the *Logan Valley* principle a step further and extended First Amendment rights insofar as picketing and a labor dispute were concerned, to a privately owned sidewalk which led to an individual store but which sidewalk was held open to access by the public.

The most recent case in this field before the Supreme Court of the United States is *Taggart* v. *Weinacker's, Inc.*, 90 S. Ct. 876 (March 9, 1970), which casts little light on the subject of this case. This also was a *picketing* case involving a shopping center but the decision did not discuss the general problem, merely concluding that in the light of an obscure record, the physical circumstances of the narrow sidewalk involved, the finding of the state court on obstruction of customers, coupled with the fact that only a bare remnant of the original controversy remained, that the writ should be dismissed as improvidently granted.

It is to be noted that each of the above cases, excluding *Marsh,* was a *picketing* case. In each case there was an activity being carried on which was consistent with and

directly related to the primary use to which the property was being put. In each of these cases there was an effort to communicate by a particular group to a particular group at a place which represented the object of protest and in each case the area selected presented the most effective point of persuasion. In *Marsh*, of course, full First Amendment rights were granted on the streets and sidewalks of a town which was wholly owned by a company as there was absolutely no place in that town in which First Amendment activities of any nature could be carried on without the consent of the landowner.

To bring the appellants in the presment case within the protection and under the umbrella of the above cases, we must either find under the *Marsh* theory that a shopping center has *all* of the attributes of a company-owned town, or under *Logan Valley, Schwartz-Torance, Lane* and *Taggart* that the activities of the appellants were consistent with and directly related to the purpose and use to which the property was actually being put.

Turning first to the *Marsh* concept:

Shopping centers are an historical and logical extension of a process which began when supermarkets and department stores developed. In the supermarket concept, grocery stores, butcher shops, bakeries, green grocers, tobacconists, liquor stores and delicatessens all combined under one roof for the convenience of customers and eventually dispensed practically every commodity attractive to the shopper, including sundries and dry goods. At the same time there was developing the department store concept in which small shops which sold ladies' dresses, men's haberdashery, cosmetics, jewelry, luggage, perfume, hardware, appliances, yardage goods, toys, sporting equipment, and furniture again combined for the convenience of the shopper under one roof. Finally, because we had become

an automobile oriented culture, all of these were brought together in the modern shopping center—some vast in size and concept such as the Inland Center, but mostly small and centered around a supermarket.

But large or small, a shopping center is not a town. Inland Center covers many acres. It caters to thousands of people each day, but large as it is, it is not a town. While the general language of *Logan Valley* clothes it for picketing purposes with the garb of "the functional equivalent of the streets and sidewalks of a normal business community," this is a legal fiction. One does not spend one's whole life in a shopping center as one may in a town, company or otherwise. The customers and employees of a shopping center leave it each day to return to "town" where they may properly be exposed to First Amendment communications on public streets, sidewalks and parks. It would be unreasonable to enlarge the company-town concept of *Marsh* to a shopping center for all First Amendment rights regardless of the size of the shopping center. The rationale of *Marsh* discussed above simply does not fit a shopping center.

Thus, the real question presented is, are the activities of the appellants consistent with and directly related to the primary purpose and use to which respondents' premises are being put under the *Logan Valley, Schwartz-Torrance, Lane* and *Taggart* concepts? We hold that the owner of a privately owned shopping center is not required to permit the unconsented use of his property for unrelated First Amendment activities by others for the following reasons:

I.

THE DESIRED USE IS NOT DIRECTLY RELATED IN ITS PURPOSE TO THE USE TO WHICH THE SHOPPING CENTER IS ACTUALLY BEING PUT.

Appellants would have us interpret the phrase "consonant with the use to which the property is actually put" to mean "consistent with the facilities available" or "consistent with the physical structure of the shopping center." This test is overbroad. There may be "facilities available" in a market, a department store, a hospital, a hotel, a private home or the waiting room of a business office. We interpret the phrase "consonant with the use to which the property is actually put" to mean some use directly connected with that particular property. Thus, in picketing cases, the use by others of the property involved is allowed for First Amendment purposes because that is the place which is the object of protest. This is a purpose directly related to the business of the shopping center. In addition, in picketing cases, there is the preferred status of picketing under Federal and California law as pointed out in *Schwartz-Torrance*. The reason *Logan Valley* and *Schwartz-Torrance* allowed picketing on the shopping center was that to do otherwise would be to immunize the shopping center, by the use of its large parking lot from any on-the-spot criticism of the economic practices of the businesses therein. This would deprive the union of the opportunity to conduct its picketing at the most effective point of persuasion—the place of the business involved. The concept of criticism is explicit in *Shwartz-Torrance* and *Logan Valley*. There, the target of criticism was within the shopping center. In the instant case, there is no attempt to criticize Homart or any store therein.

Among other contentions, appellants contend that First Amendment rights may be exercised at every location

wherein they have been "traditionally" exercised. Union picketing and other protest communications have been "traditionally" exercised at the establishment whose policies are being protested. No such situation exists herein for these appellants merely wish to engage in general, unrelated First Amendment activities on respondents' property. The concept of "tradition" is dangerously vague. Most retail, commercial establishments are open to the public and in a literal sense places of "traditional" market activity. Yet, even appellants do not contend that they can carry on their unconsented activities in a grocery store or a meat market. While the soliciting of names on an anti-pollution initiative is a highly commendable activity, it can by no stretch of the imagination be construed as being directly related to the business of the shopping center. We cannot find that the solicitation of signatures for this initiative measure is generally consonant with or directly related in its purpose to the use to which the Inland Center is actually put.[1]

II.

THE AVAILABILITY OF OTHER EFFECTIVE ALTERNATIVE CHANNELS OF COMMUNICATION.

The record is clear that in the opinion of the appellants the shopping center is the most desirable place in which to solicit signatures for an initiative petition. We feel that the record supports this view. It is an attractive, pleasant and convenient place in which to communicate

1. This limitation on the *Marsh* principle was recognized by Judge Henry J. Friendly in *Powe* v. *Miles*, 407 F. 2d 73 at p. 80, where Judge Friendly refers to *Logan Valley's* extension of the principles of *Marsh* "in the context of union picketing of one of the enterprises located there."

their message.[2] However, alternative methods of solicitation and communication are available as pointed out in the statement of facts above. It was the very absence of such channels in *Logan Valley* which caused the court in that case to find that the state substantially hindered the communication of ideas which petitioner in that case sought to express. (*Amalgamated Food Employees' Union, Local 590* v. *Logan Valley Plaza, Inc., supra,* 391 U. S. 308, 323 [20 L. Ed. 2d 603, 88 S. Ct. 1601].) In *Schwartz-Torrance,* alternatives available were such that they would involve the danger of traffic tie-ups, confusion as to the object of the picketing and the requirements of larger signs and more pickets. This brings us back to the fact that every case decided to date involving shopping centers has been a picketing case. For other First Amendment activities such as those proposed by appellants in this case, the parties can conduct their programs, carry on their communications, disseminate their information and make their solicitations on publicly owned streets, sidewalks, parks, etc.—even though these may not be as desirable as respondents' property. As a matter of rather obvious public policy, First Amendment rights of communication of ideas by word of mouth should be exercised on public property. For an exception to this rule, a strong showing of need must be made. No such showing has been made in this case. To the contrary there are available other effective (although admittedly not as desirable) alternative channels of communication.

2. One is reminded of the contention made in *Adderley* v. *Florida, supra,* that the protesters there had a right to stay on jail property because the area was "particularly appropriate." To this contention, the court responded, "Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners rely on, *Cox* v. *State of Louisiana, supra,* at 554-555 and 563-564, 85 S. Ct. at 464 and 480. We reject it again."

III.

THE POTENTIAL FOR OBSTRUCTION AND INTERFERENCE OCCASIONED BY THE EXERCISE OF UNRELATED FIRST AMENDMENT RIGHTS IN A SHOPPING CENTER WARRANTS A DENIAL OF THOSE RIGHTS THEREON.

Even when dealing with public property, the exercise of First Amendment rights may be regulated where such exercise will unduly interfere with the normal use of the public property by other members of the public with an equal right of access to it. (*Taggart* v. *Weinackers, Inc., supra,* 90 S. Ct. 876, 877; *Amalgamated Food Employees' Union, Local 590* v. *Logan Valley Plaza, Inc., supra,* 391 U. S. 308, 320-321 [20 L. Ed. 2d 603, 88 S. Ct. 1601].)

Appellants point out that in *In re Hoffman, supra,* 67 Cal. 2d 845, and *Wolin* v. *Port of New York Authority,* 392 F. 2d 83, the courts expressly rejected the two tests previously discussed, i.e., that the proposed use must be related to the business of the property involved and that there not be available other effective channels of communication. However, *Hoffman* and *Wolin* are clearly distinguishable on their facts. In each case there was leaflet distribution concerning the United States involvement in Viet Nam. It is true that in neither was the activity related to the business of the property owner and in both there were available other effective channels of communication. However, the physical facts of the property involved create a clear distinction between these cases and the instant case. In *Hoffman,* the activities were being conducted in the Los Angeles Union Railroad Station which was then a great railway terminal serving three major railroads. In *Wolin,* the site of the activities was an immense bus terminal covering a full city block and serving over 200,0000 people per day. In these cases the court permitted the

unrelated First Amendment activities, pointing out that noise and confusion were characteristic of the normal operation of a railroad station or bus terminal, that the very nature of the operations were such that the proposed activities could in no way interfere with the normal use of the property or with the normal orderly carrying on of the business conducted therein and that the property involved was an appropriate place for expression of views. The court pointed out in *Wolin*, particularly, that the character and function of the place chosen for the exercise of First Amendment rights is an important factor affecting the limits of tolerable disruption and that while the Supreme Court had protected loud and boisterous conduct on a street used as a state house driveway during the day (*Edwards* v. *South Carolina*, *supra*, 372 U. S. 229 [9 L. Ed. 2d 697, 83 S. Ct. 680]) that similar activity would not receive the same treatment if it were conducted in other places where "order and tranquility of a sort entirely unknown to the public streets are essential to their normal operation." (*Wolin*, *supra*, fn. 8, p. 90.)

Here, we feel that it is obvious that the normal activities carried on at the Inland Center can hardly be compared to those carried on in the New York Bus Terminal or the Los Angeles Union Station.

The normal orderly carrying on of business in a shopping center demands an entirely different standard of order and tranquility than the disorder, confusion and tumult to be found in a bus terminal or railroad station. The level or degree of tolerable interference between the two types of activities is so great that one set of rules cannot be made to apply to both situations.

The possibilities of the results of unrelated First Amendment activities for religious, charitable, political, social and economic purposes being carried on in the malls or on the walks, aisles, driveways and parking areas of shopping

centers (or for that matter of supermarkets or department stores) stagger the imagination. If appellants can do what they propose to do in this case, other obviously have the same right. One card table is a minimal obstruction, thirty or forty would destroy business and unduly interfere with the normal use of the property by other members of the public.

Appellants suggest that they be allowed to conduct their unrelated First Amendment activities subject to "reasonable regulations." When one contemplates the tens of thousands of shopping centers, large and small, and the large number of individuals or groups who may wish to use these premises for the exercise of unrelated First Amendment rights thereon, the problem of creating "reasonable regulations" for each case assumes epic proportions. The shopping center (or the supermarket) is "where the action is" as the citizens leave the decaying, traffic congested centers of our towns and cities and flock to the modern shopping centers with their ease of parking and other conveniences. However, merely by reason of this historic accident, we cannot turn shopping centers into miniature Pershing Squares, Union Squares or Hyde Parks. History, some of it of recent origin, has shown the irresponsibility of certain groups in exercising cherished First Amendment rights of freedom of communication and expression. Municipalities are peculiarly equipped to promulgate "reasonable regulations." But a holding that anyone may exercise his unrelated First Amendment rights on a shopping center subject only to "reasonable regulations" presents to the owners of the shopping centers policing problems of staggering proportions.

In any case such as this there is a clash between two conflicting constitutional rights—the right of the property owner to run his business without interference and the right of others to engage in First Amendment activities.

The court must accommodate these constitutional rights and look to each case to determine wherein the line has to be drawn. As the court pointed out in *Logan Valley*, a balance must be obtained which seeks to neither "substantially hinder—the communication of idea" nor "significantly interfere . . . with the use to which the [private] property is being put by both respondents and the general public." (*Logan Valley, supra*, p. 323.) Due to the brevity of the incident and the exemplary behavior of all connected with it, obstruction and interference in the instant case were minimal; nevertheless, they were "appreciable," (*In re Hoffman, supra*, fn. 6, p. 852), and the potential for obstruction and interference is clear.

We feel that the tests set forth above strike this balance.[3]

Applying the above standards to the facts in the instant case, the decision of the lower court was proper and the judgment of that court denying the injunction is affirmed.

GARDNER, *J.*

We concur:

KERRIGAN, *Acting P. J.*
TAMURA, *J.*

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3. We are aware of a three-sentence pro curiam opinion of the Supreme Court of the State of Minnesota which reversed a trespass conviction of individuals who had entered a shopping center for the purpose of distributing a pamphlet or tract on behalf of the candidacy of certain persons in a political campaign. The court said, "On May 20, 1968, the case of *Amalgamated Food Employees' Union Local 590* v. *Logan Valley Plaza, Inc.* [citation omitted] was decided by the Supreme Court of the United States. The decision is controlling over the facts involved in the case now before us. On the basis thereof the convictions must be reversed." (*State* v. *Miller*, 280 Minn. 566, 159 N. W. 2d 895.)

All we can say is that for the reasons stated in this opinion we must respectfully disagree with the simplistic approach taken by that court.

APPENDIX F

ORDER DENYING PETITION FOR REHEARING, CALIFORNIA COURT OF APPEAL JUNE 17,1970

Court of Appeal - State of California

Fourth Appellate District

DIVISION TWO

ROGER JON DIAMOND, ET AL)
)4 Civil No.1084
vs.)
)(San Bernardino
FRANK BLAND, ETC., ET AL)County #149671)

(Filed June 17, 1970)

BY THE COURT:

Appellants Petition for Rehearing

DENIED.

Dated June 17, 1970

Tamura, J., Acting P.J.

APPENDIX G

OPINION OF THE SUPREME COURT OF CALIFORNIA, DECEMBER 16, 1970

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.
In Bank.

ROGER JON DIAMOND et al.,
Plaintiffs and Appellants,
vs.
FRANK BLAND, as Sheriff, etc., et al.,
Defendants and Respondents.

L. A. 29803

(Filed Dec. 16, 1970.)

This appeal from a judgment denying preliminary and permanent injunctions entered in the Superior Court of San Bernardino County presents a constitutional question of first impression in this state: May the owners of a privately owned shopping center deny all use of their premises to persons who desire, on those premises, to engage in First Amendment activities unrelated to the business of the center?

Plaintiffs are People's Lobby, Inc., a nonprofit California corporation, which at the time of the incident giving rise to this litigation was engaged in securing signatures on two anti-pollution initiative petitions, Roger Jon Diamond, attorney for People's Lobby, and William Duxler, a volunteer working for People's Lobby in its initiative campaign. Defendants are Homart Development Company which owns a shopping center in the City of San Bernardino called the Inland Center (Center), the security guard and manager of the Center, the Sheriff and District Attorney

of San Bernardino County, and the Mayor and Chief of Police of the City of San Bernardino.

The Inland Center is located in a nonresidential area on wedge-shaped property bounded by an interstate highway, a commercial street, and a flood control channel. The Center consists of a large parking lot and a totally covered, air-conditioned shopping complex or mall which contains three major department stores—Sears, The Broadway, and The May Company—and 72 single businesses. All of the stores have an unobstructed frontage on the covered "common aisleway." The mall area is surrounded by a six-to eight-foot wide sidewalk which is adjacent to the parking lot.

The covered mall area is open to the public during business hours by means of entry through unlocked doors. Prospective customers are encouraged to visit the mall, which features piped-in music, benches, attractive 32-foot wide common aisleways, and occasional business promotions and displays. No admission is charged for entry to the mall area and no purchases are required as a condition to entry. On the average, 25,000 persons visit the Center every day, coming from a market area of one million people living in places as far from the Center as 75 miles. The Inland Center is the largest shopping center in San Bernardino County.

Under Homart's regulations, all activity apart from regulated, mutually beneficial business promotions and displays, whether by tenants or strangers, is forbidden on the premises of the Center. The policy is intended to avoid any possible congestion or disturbance which might interfere with amiable shopping by customers, and it is applied without discrimination to all varieties of charitable, religious, fraternal, social, and political groups that seek to use the Center's property for any forms of solicitation or discussion.

On October 28 and 29, 1969, representatives of People's Lobby, Inc. requested permission to gather signatures for an initiative petition and to disseminate information in connection therewith on the Center premises. Specifically, Homart was asked to permit plaintiffs to set up a card table in the mall area or on the uncovered sidewalk for the purpose of gathering signatures and distributing leaflets. Plaintiffs assured Homart that their activities would be orderly and would result in no obstruction of normal Center activities. The requests were denied.

On October 30, 1969, two representatives of the People's Lobby, accompanied by a photographer and a newspaper reporter, entered the Center, set up a card table in the mall area, and proceeded to solicit signatures on the petition, collect donations, and distribute literature. Within a few minutes, the Center's security officer approached and demanded that they cease their activities and leave the Center. They complied by moving their table from the mall area to the exterior sidewalk. Again they were ordered to leave, and they did.

The entire occurrence lasted about half an hour during which time numerous persons signed the petitions. There was no disturbance or disruption of the activities of the Center and no departure from the norm of the mall, other than the existence of the table and the gathering of persons around it to sign the petitions, receive related literature, and contribute to the anti-pollution campaign. The trial court found only that the "use sought involved *potential* obstruction and interference with the use of the property." (Italics added.)

No arrests were made as a result of the incident and the representatives of People's Lobby left the Center after the security officer's second demand that they do so. However, all parties agreed that, if plaintiffs had not complied

with the security officer's demand, police assistance would have been requested. The chief of police testified that he would have removed persons from the Center at the request of Homart if they were in violation of any city ordinance or state statute defining trespass. Penal Code section 602, subdivision (1), defines trespass to include "[e]ntering and occupying real property or structures of any kind without the consent of the owner, his agent, or the person in lawful possession thereof." Therefore, the issues raised by the instant case do not differ substantially from those that would have been involved had plaintiffs been arrested upon refusal to leave the Center.

On November 5, 1969, plaintiffs filed a complaint for injunctive and declaratory relief, alleging that defendants' refusal to permit them to use the Inland Center premises to solicit signatures on their initiative petitions and disseminate information in connection therewith was in violation of their constitutional rights under the First and Fourteenth Amendments. The trial court denied a request for a temporary restraining order and, after a hearing, judgment was entered denying preliminary and permanent injunctions.

At the outset, we face a threshold question of mootness. January 26, 1970, was the original deadline for the securing of signatures on plaintiffs' initiative petitions in time for the 1970 election, and, therefore, it might appear at first blush that the case is now moot. However, in briefs both plaintiffs and defendants urge that the case should not be considered moot because of the likelihood of recurrence of conflict between the parties regarding the rights of plaintiffs and others to engage in free speech activities on the property of the Center. (See *Moore* v. *Ogilvie* (1969), 394 U. S. 814, 816; *Eye Dog Foundation* v. *State Board of Guide Dogs for the Blind* (1967), 67 Cal. 2d 536, 541.)

In addition, plaintiffs have filed a new petition with the Secretary of State and have announced resumption of a campaign to qualify an initiative measure for the next state election. Therefore, we find that matter is not moot.

Turning to the merits, it is plaintiffs' contention that applicable case precedent interpreting the First Amendment precludes defendants from absolutely prohibiting on shopping center premises speech activities which may not be absolutely barred from the public streets and parks. We conclude that prevailing authority compels our rejection of the proposition that owners of a shopping center may impose blanket and total prohibition on the exercise of First Amendment activities on shopping center property.

We start from the premise that peaceful and orderly solicitation of signatures, discussion of issues, and distribution of information are First Amendment protected activities which may not be prohibited broadly and absolutely on public streets, parks, and similar public places traditionally associated with the exercise of First Amendment rights. (See *Food Employees* v. *Logan Plaza* (1968), 391 U. S. 308, 313, 315; *Hague* v. *C. I. O.* (1939), 307 U. S. 496.) We must decide whether the Inland Center, because of its private ownership, may insulate itself from such protected activities.

In *Marsh* v. *Alabama* (1946), 326 U. S. 501, the United States Supreme Court determined that the owners of a company town could not prevent the exercise of First Amendment rights on privately owned streets in the business district: therefore, it was held that a member of Jehovah's Witnesses could not be absolutely prohibited from distributing religious literature on the streets of the town. The court recognized that under some circumstances property that is privately owned may be treated as though it were publicly held, at least for First Amendment pur-

poses: "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. . . . Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free. . . .

"Many people in the United States live in company-owned towns. . . . There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen. . . . In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute." (Fns. omitted.) (*Id.* at pp. 506, 507, 508-509.)

Defendants concede that *Marsh* protected all First Amendment activities on the privately owned streets of the company town, regardless of any special relationship to the business of the town, but they contend that *Marsh* is distinguishable from the instant case which involves a privately owned shopping center and not an entire company town. They assert that in a company town there are no alternative effective channels of communication, while the customers and employees of a shopping center leave it each day and return to communities where they may be exposed to First Amendment communications on public streets, sidewalks, and parks.

It cannot be denied that there are distinctions between a company-owned town and a shopping center with regard to the availability of public property in the surrounding community, but the diferences have been diluted by subsequent United States Supreme Court decisions. In *Food Employees* v. *Logan Plaza* (1968) *supra,* 391 U. S. 308, the court applied the principles of *Marsh* to invalidate a shopping center's blanket prohibition of picketing on its premises. Limiting its holding to the facts before it—union picketing of an employer whose business was located within the shopping center—the court drew broad parallels between the company town in *Marsh* and the shopping center in *Logan*: "The similarities between the business block in *Marsh* and the shopping center in the present case are striking. . . . The shopping center here is clearly the functional equivalent of the business district of Chickasaw involved in *Marsh.*

"It is true that, unlike the corporation in *Marsh,* the respondents here do not own the surrounding residential property and do not provide municipal services therefor. . . . Thus, unlike the situation in *Marsh,* there is no power on respondents' part to have petitioners totally denied access to the community for which the mall serves as a business district. This fact, however, is not determinative. In *Marsh* itself the precise issue presented was whether the appellant therein had the right, under the First Amendment, to pass out leaflets in the business district, since there was no showing made there that the corporate owner would have sought to prevent the distribution of leaflets in the residential areas of the town. . . .

"We see no reason why access to a business district in a company town for the purpose of exercising First Amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business

district should be limited simply because the property surrounding the 'business district' is not under the same ownership." (*Id.* at pp. 317-319.)

The foregoing language clearly indicates that for First Amendment purposes the Supreme Court could see few relevant differences between the company town in *Marsh* and the shopping center in *Logan*.[1] Although the court understandably limited its holding to the facts before it, *Logan* is persuasive authority for the proposition that the right to engage in peaceful and orderly First Amendment activities on the premises of shopping centers should be protected to the same extent as the right recognized by the court in *Marsh* for residents of company towns. The implication is clear from *Logan* that modern-day shopping centers, serving as the business districts for the surrounding residential communities, have important public functions, and their owners may not rely on their private ownership to justify blanket prohibitions on First Amendment activities that could lawfully be conducted on public property. Indeed, in many instances the contemporary shopping center serves as the analogue of the traditional town square.

More recently, in *In re Cox* (1970) 3 Cal. 3d 205, we have had occasion to consider the constitutional implications of the role of the present-day shopping center. We held that a shopping center, like a city, could not engage in arbitrary discrimination on the basis of race, politics or dress in violation of the equal protection clause of the Fourteenth Amendment. We explicitly recognized that "[t]he shopping center has undertaken the public function of providing

1. It is noteworthy that the shopping center in *Logan* was substantialy smaller than the Inland Center. At the time of the litigation in *Logan*, only Sears and Weis Markets, Inc. were located in that shopping center; 15 additional businesses had joined the center at the time of the Supreme Court's decision.

society with the necessities of life and has become the modern suburban counterpart of the town center." (*Id.* at p. 216, fn. 11.) "In undertaking to provide the necessities and amenities of life, the shopping center performs an important public function. . . . Our modern society has become so interdependent and interrelated that those who perform a significant public function may not erect barriers of arbitrary discrimination in the marketplace." (*Id.* at p. 218.)

Finally, in *Tanner* v. *Lloyd Corporation* (D. Ore. 1970), 308 F. Supp. 128, the federal court considered facts almost identical to those before us and, relying on *Marsh* and *Logan*, held that a shopping center could not constitutionally prohibit private persons from distributing handbills within the center mall. "The sole distinction between this case and *Marsh* is that this case involves a shopping center whereas *Marsh* involved a town. I do not believe that distinction should cause a different result. . . . In my view, an owner who opens his land to the general public for business purposes, to the extent that the land becomes the functional equivalent of a public business district, gives up the right to prohibit the distribution of literature. . . . If this were not true, the public need for uncensored information, on which *Marsh* was based, could be frustrated." (*Id.* at p. 132.)[2]

Thus, the rationale of *Marsh*, plus the analogy drawn between the company town and the shopping center by *Logan* and related cases, compel a decision to grant injunctive and declaratory relief. But we need not rely solely on the foregoing approach; additional instructive precedent

2. Defendants also attempt to distinguish *Marsh* by insisting these plaintiffs can assert their First Amendment rights by means of mass media. It seems evident that mass media are particularly inappropriate for plaintiffs' purposes: no one has suggested how signatures can be obtained on initiative petitions by means of newspapers, radio or television.

supports plaintiffs' request for protection of their First Amendment rights.

In *Logan*, the Supreme Court held that a shopping center could not absolutely prohibit union picketing of a business located within the Center. The court expressly declined to decide whether "respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put." (391 U. S. at p. 320, fn. 9.) In *Schwartz-Torrance Investment Corp.* v. *Bakery & Confectionery Workers' Union* (1964), 61 Cal. 2d 766, we reached an identical result four years prior to the Supreme Court decision in *Logan*. Striking a balance between the interests of union members in picketing an employer and the desire of the owners of the center to prohibit peaceful picketing, we held that the owner of a shopping center could not enjoin as a trespass the peaceful picketing by union members of premises in the center leased by the owner to the employer of the union members. Most recently, in *In re Lane* (1969), 71 Cal. 2d 872, we extended the principles of *Logan* and *Schwartz-Torrance* to the privately owned sidewalk in front of a large supermarket and held that unobstructive union picketing and handbilling on the sidewalk were protected under the First Amendment as against the property rights of the owner-employer.

This series of cases involving union picketing in shopping centers establishes constitutional protection for picketing and other First Amendment activities which are related in their purpose to the normal use to which the shopping center property is devoted. A logical query then arises as to whether these cases provide an additional source of authority in support of plaintiffs' right to solicit signatures and distribute information within the Inland Center. Defendants contend that *Logan*, *Schwartz-Torrance*, and *Lane*

are clearly distinguishable from the instant action because the First Amendment activity conducted by plaintiffs here was not directly related to the purposes for which the Inland Center properties were being used.

Indisputably, defendants have isolated a relevant difference between the precedents and the instant case, but the question remains whether the difference justifies the holding of the trial court that defendants are free to prohibit all nonbusiness-related First Amendment activities on their premises. Both *Schwartz-Torrance* and *Logan* did rely in part on the fact that the unions involved were picketing businesses located within the shopping centers, but that circumstance was relevant only because it strengthened the interest of the petitioners in their exercise of the First Amendment activities inside the shopping centers. When the activity to be protected is the right to picket an employer, the location of the employer's business is often the only effective locus; alternative locations do not call attention to the problem which is the subject of the picketing and may fail to apply the desired economic pressure.

Plaintiffs in the instant case cannot claim that effective alternative sites for their First Amendment activities are unavailable. If plaintiffs are barred from circulating their initiative petitions in the Inland Center, they are free to do so on the public streets and sidewalks in the surrounding community. Nevertheless, it is clear that they have a substantial interest in being able to solicit signatures and distribute information at the Center. Access to the thousands of persons who congregate on foot daily at the Center is a highly significant vehicle for the dissemination of ideas, particularly when the activity requires time for discussion and a place for obtaining signatures. The Inland Center serves as the primary business district for a large surrounding community and is the most effective and desirable

location for the conduct of plaintiffs' First Amendment activities.

To be balanced against the interest of plaintiffs in the exercise of their First Amendment rights at the Center is the interest of defendants in the complete prohibition of nonbusiness-related activities. Language in *Schwartz-Torrance, Logan,* and *Lane* defines the scope of the property interest possessed by the owners of shopping centers and is no less applicable to defendants in the case at bar. In *Schwartz-Torrance,* we stated: "[T]he countervailing interest which [the owner] endeavors to vindicate emanates from the exclusive possession and enjoyment of private property. Because of the public character of the shopping center, however, the impairment of [the owner's] interest must be largely theoretical. [The owner] has fully opened his [*sic*] property to the public. . . . [It] suffers no significant harm in the deprivation of absolute power to prohibit peaceful picketing upon property to which it has invited the entire public. . . . The Supreme Court of the United States in *Marsh* . . . describes the diluted nature of a property right in premises opened to the public." (61 Cal. 2d at p. 771.) We concluded, "the interest of the [owner] lies in the shadow cast by a property right worn thin by public usage." (*Id.* at pp. 774-775.)

The Supreme Court in *Logan* used similar language to describe the property interest of the owners which was to be balanced against the union's interest in the exercise at the center of its First Amendment rights: "The sole justification offered for the substantial interference with the effectiveness of petitioners' exercise of their First Amendment rights . . . is respondents' claimed absolute right under state law to prohibit any use of their property by others without their consent. However, unlike a situation involving a person's home, no meaningful claim to protection of a right of privacy can be advanced by respondents

here. Nor on the facts of the case can any significant claim to protection of the normal business operation of the property be raised. Naked title is essentially all that is at issue." (391 U. S. at p. 324.) In *Lane*, we quoted from *Logan* and balanced the "naked title" of the owners of the supermarket against the "paramount and preferred place given to the First Amendment freedom of speech right in our democratic system. . . ." (71 Cal. 2d at p. 878.)

Therefore, although there is arguable merit to defendants' position that plaintiffs' interest in the exercise of their First Amendment rights at the Center may be less compelling than the First Amendment interests involved in *Schwartz-Torrance, Logan,* and *Lane,* their contention does not justify striking the balance in favor of defendants' property rights. As we have explained, plaintiffs' interest is of significant constitutional dimension, while defendants' concern is no stronger than the interests of the property owners in *Schwartz-Torrance, Logan,* and *Lane.* There is no allegation that the plaintiffs' conduct was in any way disruptive of the business activities carried on at the Center; and the trial court's finding of a "potential obstruction and interference with the use of the property" does not justify a blanket bar on all First Amendment activities, but merely suggests reasonable regulation of those activities.

The foregoing analysis indicates that we may not ignore the impact of *Schwartz-Torrance, Logan,* and *Lane* solely because those cases involved First Amendment activities related to the purposes for which the affected properties were being used. Furthermore, there is persuasive California authority which rejects the tests relied on by defendants to distinguish *Schwartz-Torrance, Logan,* and *Lane* from the case at bar. *In re Hoffman* (1967), 67 Cal. 2d 845 involved the constitutionality of a municipal ordinance which limited permissible activities in railway stations to

those related to railroad business. We held that the ordinance could not be applied, consistently with the First Amendment, to prohibit defendants from peacefully distributing antiwar leaflets at Union Station in Los Angeles, a privately owned railway station. In reaching this result, we expressly rejected the city's contention that the station could be limited to railroad-related uses so long as defendants were able to disseminate their views at alternative locations. "The primary uses of municipal property can be amply protected by ordinances that prohibit activities that interfere with those uses. Similarly, the primary uses of railway stations can be amply protected by ordinances prohibiting activities that interfere with those uses. In neither case can First Amendment activities be prohibited solely because the property involved is not maintained primarily as a forum for such activities. . . .

"Similarly in the present case, the test is not whether petitioners' use of the station was a railway use but whether it interfered with that use. . . . Noise and commotion are characteristic of the normal operation of a railway station. The railroads seek neither privacy within nor exclusive possession of their station. They therefore cannot invoke the law of trespass against petitioners to protect those interests. . . .

"Had petitioners in any way interfered with the conduct of the railroad business, they could legitimately have been asked to leave. . . . It is immaterial that another forum, equally effective, may have been available to petitioners. . . . Absent the presence of some conflicting interest that could be protected in no other way, petitioners have the right to choose their own forum." (*Id.* at pp. 850, 851, 852 and fn. 7.)

Hence, in *Hoffman* we held that the bare title of the owners of the railroad station was not a sufficient interest

to outweigh the interest of petitioners in the exercise of First Amendment rights at the station. We reached that conclusion even though the particular speech activities involved were not directly related to the normal uses of the affected business property. (See also *Wolin* v. *Port of New York Authority* (2d Cir. 1968), 392 F. 2d 83; cf. *Burnside* v. *Byars* (5th Cir. 1966), 363 F. 2d 744.)

Defendants would have us distinguish *Hoffman* on the ground that the potential for obstruction and interference occasioned by the exercise of unrelated First Amendment rights in a shopping center is much greater than that potential in a railway station. They contend that the normal functioning of business in a shopping center demands a more rigid standard of order and tranquility than the business activities at railway stations, up to recent years characterized by noise and commotion. Therefore, they conclude that their interests in prohibiting activities unrelated to business in the Inland Center are greater than the concerns of the owners of Union Station.

Though debatable, it may be conceded that a large shopping center is not likely to be as noisy, crowded, or active as the railway station in *Hoffman*, but the difference is one only of degree. Certainly, a shopping center does not require the same perfect order, silence, and contemplative environment as, for example, a public library or courthouse. A shopping center to which the public is invited and where thousands of persons come to shop, browse, stroll, and talk is no more likely to be disrupted by peaceful and orderly circulation of a petition than a railway station; and the business of a railway station, as much as that of a shopping center, can be disrupted by *unregulated* First Amendment activity, whether that activity is related or unrelated to the uses of the affected property. Thus the owner of a shopping center, like the owner of a railway station, has no

legitimate interest in absolutely prohibiting all First Amendment activities on his premises.

It bears repeating that no evidence was presented to the trial court that plaintiffs' activities actually interfered with the normal business operations of the Inland Center.[3] Plaintiffs do not contend that they are entitled to use private property for the dissemination of ideas without limitations imposed by reasonable regulations designed to protect the business activities of the Center. Each of the cases upon which we rely—*Marsh, Logan, Schwartz-Torrance, Lane,* and *Hoffman*—presumed that the property owners involved were free to impose "reasonable regulations" upon the exercise of First Amendment rights on their premises; and each of the cases emphasized that disruptive First Amendment activities may be prohibited by the owners of private property opened to the public.

We impose no unrealistic burden on the operators of shopping centers in insisting that their control over First Amendment rights be exercised, if at all, through reasonable regulations calculated to protect their business interests rather than through absolute bans on all non-business-related activities. Shopping centers, like railway stations, are not incapable of regulating permissible activities. If regulations could not be designed, the decisions in *Schwartz-Torrance* and *Logan* might have produced chaos, as labor unions and other groups would have been free to picket businesses in the shopping centers without reasonable limitation as to time, place, or manner. Moreover, the trial court findings in the instant action demonstrate the ability of Inland Center to regulate the various sales pro-

3. The "obstruction" in this case is comparable to that involved in *In Re Wallace* (1970), 3 Cal. 3d 289, 295.

motions and displays that are permitted in the common aisleways: "In every instance where a promotion is held, it is closely regulated as to time, date, location, number of people or exhibits involved, manner of presentation and security factors." Similar regulations, if not repressive in scope, can be devised to protect Inland Center from actual or potential danger of First Amendment activities being conducted on its premises in a manner calculated to disrupt normal business operations and to interfere with the convenience of customers.

We conclude that the line of cases beginning with *Marsh* and including *Schwartz-Torrance, Logan, Lane,* and *Hoffman* compels a reversal of the judgment rendered by the trial court and entitles plaintiffs to a judgment confirming their right to circulate initiative petitions and to engage in other peaceful and orderly First Amendment activities on the premises of the Inland Center[4] and declaring that defendants may not constitutionally impose a prohibition on all First Amendment activity on the premises of their shopping center. Unless there is obstruction of or undue interference with normal business operations, the bare title of the property owners does not outweigh the substantial interest of individuals and groups to engage in peaceful and orderly First Amendment activities on the premises of shopping centers open to the public.

4. Although the parties have not raised the issue, we have not overlooked consideration of the concept of state action. It is elementary constitutional doctrine that the First and Fourteenth Amendments protect individuals only from state action which inhibits their free speech rights. Here we find state action of a character comparable to that in *Logan, Schwartz-Torrance,* and *Lane.* We explained in *In re Cox* (1970), supra, 3 Cal. 2d 205, 217 fn. 11: "In *Logan Valley, Lane and Schwartz-Torrance,* the United States Supreme Court and this court found 'state action' under the Fourteenth Amendment in a shopping center's refusal to permit the exercise of First Amendment rights in such public areas as sidewalks, parks, and malls."

The judgment is reversed and the trial court is directed to enter judgment for plaintiffs consistent with the views expressed in this opinion.

MOSK, *J.*

We concur:

WRIGHT, *C. J.*
PETERS, *J.*
TOBRINER, *J.*
BURKE, *J.*
SULLIVAN, *J.*

Diamond v. *Bland*
L. A. 29803

DISSENTING OPINION BY McCOMB, *J.*

I dissent. I would affirm the judgment for the reasons expressed by Mr. Justice Gardner in the opinion prepared by him for the Court of Appeal in *Diamond* v. *Bland* (Cal. App.), 87 Cal. Rptr. 97.

McCOMB, *J.*

APPENDIX H

JUDGEMENT, JANUARY 28, 1971

SUPERIOR COURT OF THE STATE OF CALIFORNIA

For the County of San Bernardino

ROGER JON DIAMOND, WILLIAM DUXLER, PEOPLE'S LOBBY, INC., *Plaintiffs and Appellants,*

vs.

FRANK BLAND, SHERIFF OF SAN BERNARDINO COUNTY, ET AL., *Defendants and Respondents.*

No. 149671.

FINAL JUDGMENT (Permanent Injunction).

To: Frank Bland, Sheriff of San Bernardino County; Louis J. Fortuna, Chief of Police of City of San Bernardino; Lowell E. Lathrop, District Attorney of San Bernardino County; James Lambert; C. H. Barret; Al C. Ballard, Mayor of City of San Bernardino; Homart Development Company, a corporation:

Upon issuance of the remittitur by the Supreme Court with respect to its written opinion in this case filed on December 16, 1970,

IT IS HEREBY ORDERED that defendants Frank Bland, Sheriff of San Bernardino County; Louis J. Fortuna, Chief of

Police of City of San Bernardino; Lowell E. Lathrop, District Attorney of San Bernardino County; James Lambert; C. H. Barret; Al C. Ballard, Mayor of City of San Bernardino and Homart Development Company, a corporation, be, and they are hereby permanently enjoined and restrained from: Interfering in any way with the right of Roger Jon Diamond, William Duxler or the People's Lobby, Inc., to circulate initiative petitions and to engage in other peaceful and orderly First Amendment activities on the premises of the Inland Center.

Dated: Jan. 28, 1971.

James E. Cunningham, Sr., .
Judge.

APPENDIX I

ORDERS DENYING CERTIORARI AND DENYING REHEARING

No. 1469. HOMART DEVELOPMENT CO., Petitioner, v ROGER JON DIAMOND et al.

402 US 988, 29 L Ed 2d 153, 91 S Ct 1661.

May 17, 1971. Petition for writ of certiorari to the Supreme Court of California denied. The Chief Justice and Mr. Justice Blackmun are of the opinion that certiorari should be granted.

Same case below, 3 Cal 3d 653, 91 Cal Rptr 501, 477 P2d 733.

No. 1469, October Term, 1970. HOMART DEVELOPMENT CO., Petitioner, v ROGER JON DIAMOND et al.

404 US 874, 30 L Ed 2d 120, 92 S Ct 27.

October 12, 1971. Petition for rehearing denied.

Former Decision, 402 US 988, 29 L Ed 2d 153, 91 S Ct 1661.

No. 1469, October Term, 1970. HOMART DEVELOPMENT CO., Petitioner, v ROGER JON DIAMOND et al.

405 US 981, 31 L Ed 2d 257, 92 S Ct 1189.

March 6, 1972. Joint motion for leave to file petition for rehearing denied. The Chief Justice and Mr. Justice Blackmun are of the opinion that the motion should be granted.

Former Decisions, 402 US 988, 29 L Ed 2d 153, 91 S Ct 1661; 404 US 874, 30 L Ed 2d 120, 92 S Ct 27.

No. 1469, October Term, 1970. Homart Development Co., petitioner, v Roger Jon Diamond et al.

409 US 897, 34 L Ed 2d 154, 93 S Ct 9.

October 10, 1972. Motion for leave to file a third petition for rehearing denied. Mr. Justice Blackmun would call for a response pursuant to Rule 58(3).

Former Decisions, 402 US 988, 29 L Ed 2d 153, 91 S Ct 1661; 404 US 874, 30 L Ed 2d 120, 92 S Ct 27; 405 US 981, 31 L Ed 2d 257, 92 S Ct 1189.

APPENDIX J

ORDER OF THE CALIFORNIA SUPERIOR COURT
DECEMBER 6, 1972

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN BERNARDINO

ROGER JON DIAMOND, ET AL., Plaintiffs, vs. FRANK BLAND, SHERIFF OF SAN BERNARDINO COUNTY, ETC., ET AL., Defendants.	NO. 149671

ORDER DISSOLVING INJUNCTION

The motion of defendant Homart Development Company to dissolve the injunction heretofore issued by this Court having come on for hearing on November 30, 1972 and plaintiffs appearing by Roger Jon Diamond, Esq., and defendant Homart Development Company, a corporation, appearing by Lonergan, Jordan, Gresham & Varner by Allen B. Gresham, Esq. and Lederer, Fox and Grove by Lawrence M. Cohen, Esq., and evidence having been introduced and the matter having been argued to the Court and memoranda having

been submitted thereon, and evidence both oral and documentary having been presented and the Court having considered the same, and good cause appearing therefor;

IT IS HEREBY ORDERED that the motion to dissolve this Court's injunction is hereby granted.

The court assigns as reasons for its ruling the following:

1. The reasons set forth by this Court in its original order of November 20, 1969 denying a preliminary injunction, and its findings of fact and conclusions of law of December 5, 1969, remain true and valid as of the present date. Specifically:

(a) This Court found, and the District Court of Appeals and California Supreme Court affirmed, that plaintiffs had available other effective, although perhaps less desirable, sites and techniques to achieve their purpose. Plaintiffs have introduced no evidence to show that they were unsuccessful in seeking to utilize such alternatives, or that such alternatives are no longer available or no longer effective, or that the requisite numbers of signatures required for an initiative cannot be obtained should this Court grant the instant motion.

(b) This Court found, and it is still true, that the plaintiffs may seek legislative action, for example to extend the time to circulate initiative petitions or to adopt alternative methods for citizens to initiate legislation, if the existing statutory period is not adequate.

(c) This Court found that Inland Center has not been dedicated to the public use or divested of its private character; that there is no privity between Homart or its tenants and plaintiffs nor benefit that Homart or its tenants derived from plaintiffs' desired activities; that, Homart enforced its non-discriminatory prohibition of the kind of activity which plaintiffs seek to exercise and allowed such activity on the premises only as a result of and in compliance with the injunction of this Court; and that plaintiffs' desired activities have no relation to any purpose for which Inland Center was built and is being used; no evidence was presented to the Court of any change in these facts.

2. As the California Supreme Court found, the facts involved in Lloyd Corporation vs. Tanner, ___U.S. ___, 33 L. Ed. 2d 131 (June 22, 1972), which issued after the California Supreme Court's decision in the instant case, are "almost identical" to those before this Court. In that case, and the companion case of Central Hardware Co. vs. N.L.R.B., ___U.S. ___, 33 L. Ed. 2d 122 (June 22, 1972) which involved union organizational solicitation, the United States Supreme Court held that, in circumstances such as those here at issue, there is no constitutional right to engage in such activities on shopping center premises. This Court finds no distinction in the fact that Lloyd involved handbilling and this case involves initiative petiton solicitation. In each instance, Lloyd held that, as a matter of law, there are necessarily effective alternative means of

communication where a nonrelated use is sought to be engaged in on private property. This Court thus concurs with the Rhode Island Supreme Court's decision in another virtually identical case (Homart Development Co. vs. Fein, No. 75-275 (July 24, 1972)) that Lloyd "is dispositive" and "controlling."

3. The parties have stipulated that, should this Court's injunction not be dissolved, plaintiffs will, as in the past, conduct initiative campaigns and will seek to engage in, as permitted by law, petition solicitation on the premises of Inland Center and other shopping centers throughout the State. Homart will, therefore, be seriously harmed by the continuance of this Court's injunction.

IT IS FURTHER ORDERED that each party hereto bear its own costs in this proceeding.

Dated: December 6, 1972.

/s/ James E. Cunningham, Sr.
JAMES E. CUNNINGHAM, SR.,
Judge

APPENDIX K

OPINION OF THE CALIFORNIA COURT OF APPEAL, JULY 10, 1973

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

ROGER JON DIAMOND, et al.,	)	
Plaintiffs and Appellants,	)	
vs.	)	4 Civil
	)	12497
FRANK BLAND, et al.,	)	
Defendants and Respondents.	)	

OPINION

(Filed July 10, 1973)

APPEAL from the Superior Court of San Bernardino County. James E. Cunningham, Sr., Judge. Affirmed.

Roger Jon Diamond for Plaintiffs and Appellants.

Lederer, Fox and Grove, by Lawrence M. Cohen; and Lonergan, Jordan, Gresham & Varner, by Allen B. Gresham, for Defendants and Respondents.

In 1969, plaintiffs filed an action in the Superior Court of San Bernardino County. In it they alleged that the

defendants refused to permit them the use of the premises of the Inland Center (a privately owned shopping center) to solicit signatures on their initiative petion and to disseminate information in connection therewith. The trial court denied both preliminary and permanent injunctions.

On appeal, this court affirmed the trial court. (Diamond v. Bland, (Cal.App.) 87 Cal.Rptr. 97.) The Supreme Court granted a hearing and reversed the trial court. (Diamond v. Bland, 3 Cal.3d 653.) Certiorari was denied by the United States Supreme Court. In 1971, the trial court granted the permanent injunction.

On June 22, 1972, the United States Supreme Court filed its opinion in Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551 [33 L.Ed. 2d 131, 92 S.Ct. 2219]. Lloyd involved an almost identical factual situation,[1] and the court reached a conclusion diametrically opposite to that of the Supreme Court of this state in Diamond. The parties then returned to the trial court which, on the authority of Lloyd, dissolved the permanent injunction. Plaintiffs again appeal.

The facts and issues are set forth in Diamond v. Bland, supra, and need not be repeated here. Based upon almost identical facts, Lloyd held that there was no basis for injunctive relief inasmuch as

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1. The California Supreme Court in Diamond v. Bland, in citing Lloyd (then at the trial level) (308 F.Supp. 128) stated that Lloyd was based upon facts "almost identical with those here. (3 Cal.3d at p. 660.)

plaintiffs' First Amendment activities "had no relation for any purpose for which the center was built and being used." (Lloyd, supra, 33 L.Ed. 2d at p. 140.) Lloyd isolated three key factors in determining whether an owner's property rights must yield to permit First Amendment activities: (1) the private property has assumed "to some significant degree the functional attributes of public property devoted to public use" (Central Hardware Co. v. N.L.R.B., 407 U.S. 539 [33 L.Ed. 2d 122, 128-129, 92 S.Ct. 2238]; (2) no adequate alternative avenues of communication exist (Lloyd, supra, 33 L.Ed. 2d at p. 141); and (3) a relationship between the purpose of the First Amendment activities and the business of the shopping center. (Lloyd, supra, 33 L.Ed. 2d at p. 140.) Here, the Inland Center is almost identical to the Lloyd Center and thus has not become the functional equivalent of public property under Lloyd; the invitation to the public is limited in nature. The circulation of the initative petition was not directly related to the purpose for which the Inland Center properties were being used (Diamond v. Bland, supra, 3 Cal. 3d at p. 663), and plaintiffs have available to them effective alternative sites for their activities. (Ibid., at p. 662.)

Plaintiffs attempt to avoid the impact of Lloyd on the following grounds:

(1) The trial court failed to explore the alternative means and locations whereby they could have effectively accomplished their petition circulation objectives,

rejecting their offer of proof on this issue. However, the record of the trial court reflects substantial support for the court's conclusion that the plaintiffs had alternatives available. Indeed, the Supreme Court in Diamond said, "Plaintiffs in the instant case cannot claim that effective alternative sites for their First Amendment activities are unavailable. If plaintiffs are barred from circulating their initiative petitions in the Inland Center, they are free to do so in the public streets and sidewalks in the surrounding community." (3 Cal. 3d at p.662.)

(2) The failure of the United States Supreme Court to grant certiorari in Diamond in some way placed a judicial stamp of approval on that case. He cites no authority for such a startling contention, nor are we aware of any. Denial of certiorari is meaningless, especially where the court granted it in a virtually identical case and chose that case to expose its opinion.

(3) Lloyd is limited to covered mall areas and not exterior parking lots. No such distinction is to be found in Lloyd.

(4) Petition circulating is to be distinguished from the distribution of handbills (Lloyd), or solicitation (Central Hardware Co.) However, the Supreme Court said in Food Employees v. Logan Valley Plaza, 391 U.S. 308 at p. 315 [20 L.Ed. 2d 603, 610, 88 S.Ct. 161] that the distinction between handbilling and picketing "is immaterial so far as the question is solely one of right of access for the purpose of expression of views." And in Homart Development Co. v. Fein,

(Rhode Island) 293 A. 2d 493, fn. 1, the Rhode Island Supreme Court held that Lloyd was dispositive of the appeal in a case which involved nominating petitions. The concurrence of Chief Justice Roberts of that court is based solely on the compulsion of Lloyd; his opinion makes clear that in the absence of Lloyd he would have decided the case differently. We fail to find any meaningful distinction between petition circulating and handbilling.

(5) Police Department v. Mosley, 408 U.S. 92 [33 L.Ed.2d 212, 92 S.Ct. 2286] and Grayned v. Rockford, 408 U.S. 104 [33 L.Ed.2d 222, 92 S.Ct. 2294] "severely weaken" Lloyd. Hardly, Mosley and Grayned involve a totally different issue, i.e., the need to permit free expression of ideas in public places.

Lloyd involves no factual distinction from the instant case and is dispositive and controlling.

Plaintiffs contend that even though the United States Supreme Court may have overruled the Supreme Court of this state, that until the Supreme Court of this state expressly overrules its own holding in Diamond v. Bland, supra, 3 Cal.3d 653, that case is binding on the lower court and on this court, citing Auto Equity Sales, Inc. v. Superior Court, 57 Cal. 2d 450, 455.

However, in view of the changed legal position, the superior court clearly had authority to dissolve its prior injunction. "This is so because the decree, although purporting on its face to be permanent, is in essence of an executory or continuing nature, creating no right

but merely assuming to protect a right from unlawful and injurious interference. Such a decree, it has uniformly been held, is always subject, upon a proper showing, to modification or dissolution by the court which rendered it." (Sontag Chain Stores Co. v. Superior Court, 18 Cal. 2d 92, 94-95; see also Union Interchange, Inc. v. Savage, 52 Cal. 2d 601, 605.) The trial court properly applied the law as stated in Lloyd v. Tanner in dissolving the injunction.

Judgment affirmed.

/s/ Gardner
P.J.

I concur:

/s/ Kerrigan
J.

DISSENTING OPINION BY TAMURA, J.

In my opinion Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551 [33 L.Ed.2d 131, 92 S.Ct. 2219] is not dispositive of the case at bench. I shall try to state briefly why.

From time immemorial the market place, whether it be the country store of a small village or the business district of a metropolis, has been one of the traditional forums for discussion of public issues and communication of ideas. In recent years huge suburban regional shopping centers serving virtually all the family needs of inhabitants of surrounding cities and communities have largely

displaced traditional downtown shopping districts. Immunizing these huge commercial centers from First Amendment activities would result in substantial diminution of effective forums of communication. It would leave the mass media, realistically accessible only to the wealthy, as the only effective means of communicating with the millions across the land who by virtue of these centers rarely find it necessary to visit downtown districts. Those individuals and groups without financial resources would be left to deserted and decaying downtown areas; hardly effective forums for communicating to that segment of the public sought to be reached. These, I believe to be irrefutable facts of contemporary American life.

The majority would interpret the 5 to 4 Lloyd decision nevertheless to mean that owners of these huge shopping centers may now declare their premises off limits to all First Amendment activities other than in exceptional situations where the message sought to be communicated is directly related to the business of the shopping center. I disagree with that interpretation.

While Lloyd rejected the broad implication of Marsh v. Alabama, 326 U.S. 501 [90 L.Ed. 265, 66 S.Ct. 276] and Food Employees v. Logan Valley Plaza, 391 U.S. 308 [20 L.Ed.2d 603, 88 S.Ct. 1601], that private property serving the "functional equivalent of a business block" must for First Amendment purposes be deemed the equivalent of public property, it did not at the same time adopt a doctrinaire position that all First Amendment activities except those directly related to the

purpose for which the property is used may be barred. Instead, the court attempted to formulate principles whereby competing claims of property rights and First Amendment rights may be accommodated when privately owned property assumes "to some significant degree the functional attributes of public property devoted to public use,"[1] mindful of the special solicitude courts have properly accorded First Amendment rights. It is in the context of this central them of Lloyd that we must interpret the court's discussion of the bases upon which it distinguished Logan Valley.

Lloyd noted that in Logan Valley the message sought to be communicated by the pickets related to the business of a

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1. In Central Hardware Company v. N.L.R.B., 407 U.S. 539 [33 L.Ed.2d 122, 92 S.Ct. 2238], the court rejected the asserted First Amendment claim on the ground the parking lot of the retail hardware store was not the equivalent of a "public municipal facility" for First Amendment purposes. The court declared: "Before an owner of private property can be subjected to the commands of the First and Fourteenth Amendments the privately owned property must assume to some significant degree the functional attributes of public property devoted to public use. . . ." (407 U.S. 539 [33 L.Ed.2d 122, 128-129, 92 S.Ct. 2238, 2243].) It distinguished Logan Valley on the ground the private property there involved consisted of "a large commercial shopping center which the Court found had displaced, in certain relevant respects, the functions of the normal municipal 'business block.'"

supermarket within the shopping center and that there was not effective alternative means of communicating the message to the intended audience. Those two factors, the court observed were absent in Lloyd. It pointed to the fact that handbills protesting the draft and the Vietnam war had no direct relationship to the business of the shopping center. Moreover, according to the court, the leaflets could have been distributed to entering and departing motorists and pedestrians from public sidewalks and streets adjacent to the center, noting that in moving in and out of the private parking lots "automobiles are required by law to come to a complete stop." (Lloyd Corp., Ltd. v. Tanner, supra, 407 U.S. 551 [33 L.Ed.2d 131, 141, 92 S.Ct. 2219, 2228].) The court then concluded: "It would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist. Such an accommodation would diminish property rights without significantly enhancing the asserted right of free speech. . . ." (Emphasis supplied.) (Lloyd Corp., Ltd. v. Tanner, supra, 407 U.S. 551 [33 L.Ed.2d 131, 141-142, 92 S. Ct. 2219, 2228].)

Nowhere in Lloyd does the court state that absence of a direct relationship between the message and the business of the center provides an independent basis for barring First Amendment activities. Although the opinion is admittedly ambiguous in this respect, such a mechanical rule would be inconsistent with the balancing of interest theory espoused by

the court. To make relationship alone dispositive would result not in an accommodation of conflicting rights but a preference of property rights over First Amendment rights. It would excuse private property owners from the commands of the First and Fourteenth Amendments. Until private property assumes "to some significant degree the functional attributes of public property devoted to public use," it cannot be subjected to the demands of the First and Fourteenth Amendments and the constitutional issue of accommodation does not even arise. (Central Hardware Company v. N.L.R.B., supra, 407 U.S. 539 [33 L.Ed.2d 122, 128-129, 92 S.Ct. 2238, 2243].) But, as I read Lloyd and Central Hardware, when private property displaces to a significant degree the normal functions of a business district as it did in Logan Valley, Lloyd, and the case at bench, the property owner is subject to the "commands of the First and Fourteenth Amendments" and there must be an accommodation of private property and First Amendment rights.[2] As I understand Lloyd

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2. Lloyd did not, as the majority in the case at bench suggest, reject the district court's finding that the Lloyd shopping center served the functional equivalent of a public business district. Indeed, under the principle enunciated in Central Hardware, absent that finding the Supreme Court would not have been faced with the constitutional issue raised by the competing claims of First Amendment and property rights.

Our high court has held that a shopping center is subject to the Unruh Civil Rights Act (Civ. Code, Sec.51) and may not

the line which is drawn should protect the interest of the property owner without, however, abridging the First Amendment right to communicate with the people drawn to the property. First Amendment claims come into play when private property displaces the normal functions of a business district because the affirmative maintenance of effective forums for political discussion and exchange of ideas is essential to the preservation of a free society.[3] In determining when

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arbitrarily exclude a customer from its premises. (In Re Cox, 3 Cal.3d 205.) The court's comment concerning the public functions performed by shopping centers is particularly apposite to the case at bench; it stated: "In undertaking to provide the necessities and amenities of life, the shopping center performs an important public function. In some areas the public must rely upon the shopping center as its sole source of food, clothing and other commodities. If a shopping center arbitrarily denies individuals the right to purchase essentials, these people may have no practicable alternative source of supply. Our modern society has become so interdependent and interrelated that those who perform a significant public function may not erect barriers of arbitrary discrimination in the marketplace." (3 Cal.3d 205, 218.)

3. Our Constitution is premised on the theory that "the best test of truth is the power of the thought to get itself accepted in the competition of the market . . ." (Holmes, J., dissenting in Abrams v. United States, 250 U.S. 616, 624, 630 [63 L.Ed. 1173, 1180, 40 S.Ct. 17, 22].) "[O]pportunity for free political

property interest must yield, the heart of the inquiry should therefore be whether alternative effective means of communication exist; the relationship of expressive activity to the purpose to which the property is devoted should be relevant only to the extent it bears upon the means of communicating the message to the intended audience.[4] To make the right of access turn solely on message content would result in substantial abridgement of the right of free speech. It would not only withdraw an important forum for communication of ideas, but inherent in such a rule would result in substantial abridgement of the right of free speech. It would not only withdraw an important forum for

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discussion" is the foundation of constitutional government. (De Jonge v. Oregon, 299 U.S. 353, 365 [81 L.Ed. 278, 284, 57 S.Ct. 255, 260].)

4. Commentators all express concern over the lack of clarity in Lloyd concerning the independence or interdependence of the two factors on which it distinguished Logan Valley and urge that under the accommodation theory advanced, the central inquiry should be the existence of alternatives. (The Supreme Court, 1971 Term, 86 Harv. L. Rev. 52, 122; Lloyd Corp. v. Tanner: A Shopping Center Open For Business But Not For Dissent, 25 Maine L. Rev. 131; Free Speech In The Marketplace--Accommodating "Speech Plus" Activity And Property Rights, 44 U. of Col. L. Rev. 259; Shopping Centers And The "Quasi-Public Forum, 51 N. Car. L. Rev. 123.)

communication of ideas, but inherent in such a rule would be the danger that only such expressive activity will be permitted as pleases the owner.

Unlike distribution of handbills, signatures to an initiative petition cannot be effectively solicited or obtained on a public sidewalk adjacent to the entrance of a shopping center while cars momentarily stop as they enter and leave.[5] Nor are other suggested means effective alternatives. A massive house-to-house drive is an alternative available only to well-financed groups. It is also evident, as our Supreme Court observed in Diamond v. Bland, 3 Cal.3d 653, 660, footnote 2, "that mass media are particularly inappropriate . . . no one has suggested how signatures can be obtained on initiative petitions by means of newspapers, radio or television." The right of initiative

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5. I recognize that in Homart Development Company v. Fein, 293 A.2d 493, the Supreme Court of Rhode Island held that Lloyd Corp., Ltd. v. Tanner, supra, 407 U.S. 551 [33 L.Ed.2d 131, 92 S.Ct. 2219] permitted the owner of a large shopping center to bar solicitation of signatures on nomination petitions. The trial judge in that case found there were numerous public business districts, parks, beaches, as well as other unrestricted private shopping centers where signatures could be solicited. The Supreme Court, however, failed to deal with what I believe should have been the crucial inquiry--whether the alternatives were effective and adequate. Such an inquiry may well have revealed the existence of effective alternative means of securing signatures.

reserved to the citizens of this state under our state Constitution[6] "is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure in spirit as well as letter." (McFadden v. Jordan, 32 Cal. 2d 330, 332.) "The desirability of having initiative measures . . . reach the ballot without delay or excessive expenditures of time, money, and effort is a factor of which the courts are ever mindful." (Gage v. Jordan, 23 Cal.2d 794, 799.[7]) To permit owners of regional shopping centers to bar solicitation of signatures to an initiative petition on their premises would result in a substantial infringement of the exercise of the initiative power. One can hardly conceive of a more important political right--other than the right of franchise itself--than the right of citizens to participate directly in the legislative process of government.[8] Requiring property rights to

6. California Constitution, article IV, sections 1, 22, 24 and 25.

7. First petitions with signatures must be filed with the county clerk not later than 90 days from the date the Attorney General delivers or mails to the proponents a summary of the proposed initiative measure. (Elec.Code, Sec.3507.) No initiative may be placed on a statewide special election ballot which qualifies later than 131 days before the election. (Elec. Code, Sec. 3508.)

8. The case at bench might well be rested on this independent state ground if our Supreme Court be so inclined. (See dissenting opinion of Chief Justice O'Connell of the Oregon Supreme Court in Lenrich Associates v. Heyda, 504 P.2d 112, 119.)

yield to the exercise of that right subject to reasonable regulation is consistent with the principle of accommodation announced in Lloyd Corp., Ltd. v. Tanner, supra, 470 U.S. 551 [33 L.Ed.2d 131, 92 S.Ct. 2219].

I would reverse the order of the court below with directions to reinstate the injunction heretofore issued under the authority of Diamond v. Bland, supra, 3 Cal.3d 653.

/s/ Tamura
J.

APPENDIX L

ORDER OF THE CALIFORNIA COURT OF APPEAL, JULY 26, 1973

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

ROGER JON DIAMOND, et al Appellants vs. FRANK BLAND, Etc., et al Respondents	4 Civ. No. 12497 County No. 149671

BY THE COURT:

The Petition for Rehearing is DENIED.

Justice Tamura would GRANT the Petition for Rehearing.

Gardner, P.J.

APPENDIX M

APPLICATION BY CALIFORNIA SECRETARY OF STATE FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR REHEARING

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

ROGER JON DIAMOND, et al., Plaintiffs and Appellants, v. FRANK BLAND, et al., Defendants and Respondents.	4th Civil No. 12497

APPLICATION BY EDMUND G. BROWN JR. SECRETARY OF STATE FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR HEARING

TO THE HONORABLE DONALD R. WRIGHT, CHIEF JUSTICE OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Applicant Edmund G. Brown Jr. is the Secretary of State of California. As such he is responsible for the overall administration of the election laws of the State of California, Brown v. Superior Court, 5 Cal.3d 509 (1971), including the laws governing circulation of initiative and

referendum petitions. Under art. 4 Sec. 22(b) of the Constitution, initiative petitions are presented to the Secretary of State.

Applicant Brown respectfully requests permission to file an amicus curiae brief in the above-entitled cause, pursuant to Rule 14 of the California Rules of Court

Applicant is familiar with the questions involved in this case. As Secretary of State and chief elections officer, he has the responsibility to preserve and protect the initiative process, and he seeks leave to present his views in this proceeding because he believes the right of initiative will be severely curtailed if the decision of the Court of Appeal is affirmed.

WHEREFORE, applicant Brown prays for an order permitting him to file an amicus curiae brief in support of the Petition for Hearing.

Dated: August 10, 1973.

Respectfully submitted,

/s/ Daniel H. Lowenstein
Daniel H. Lowenstein

Attorney for Applicant
EDMUND G. BROWN JR.

BRIEF OF EDMUND G. BROWN JR., SECRETARY OF STATE, AS AMICUS CURIAE IN SUPPORT OF PETITION FOR HEARING

The courts of this state have often recognized the importance of the initiative as a cornerstone of democratic

government in California and have indicated that they will be "zealous" to preserve it. E.g., McFadden v. Jordan, 32 Cal.2d 330, 332 (1948).

If the courts are to preserve the initiative, they must first of all recognize the practical difficulty of qualifying initiative measures. At the present time approximately 325,000 signatures are required for qualification of an initiative statute and approximately 520,000 to qualify an initiative constituional amendment. See Cal. Const. art. 4, Sec. 22(b). Proponents must obtain this large number of signatures in not more than 150 days. See Elections Code Secs. 3507, 3520. The great number of signatures required to qualify a measure for the ballot in a short amount of time compels signature solicitors to go to places where large numbers of persons can be met and talked to on a face-to-face basis. In most parts of California today, the shopping center is far and away the most effective place for making contact with voters and soliciting their signatures. As this Court recognized in In re Cox, 3 Cal.3d 205, 216, n. 11 (1970):

> The shopping center has undertaken the public function of providing society with the necessities of life and has become the modern suburban counterpart of the town center.

This Court has itself recognized the importance of shopping centers for qualifying initiative measures. Diamond v. Bland, 3 Cal.3d 653 (1970), cert. den. 402 U.S. 988 (1971), rhg. den. 404 U.S. 874 (1971),

2nd rhg. den. 405 U.S. 981 (1972), 3rd rhg. den. 409 U.S. 877 (1972).

Shopping centers are of particular importance to volunteer circulation drives which are only modestly financed. Because of the cost of circulating a statewide petition, there is a serious danger of the initiative being captured by special interests which have the financial resources to qualify measures which will be beneficial to themselves. Financial reports filed in the Secretary of State's office show that a great discrepancy exists in the amounts spent to qualify initiative petitions. For example, less than $50,000 was spent to qualify the Marijuana Initiative, Proposition 19, in the November 1972 election, less than $20,000 was spent to qualify the Obscenity Initiative, Proposition 18 in that election, and less than $10,000 was spent on the Clean Environment Initiative, Proposition 22 in November 1972, almost $400,000 was spent to qualify the State Employees Initiative, Proposition 15 in November 1972, and more than $400,00 was spent to qualify the governor's tax initiative which will be on the ballot in November 1973. If the decision of the Court of Appeals in this case is not reversed, it may eliminate low-cost circulation drives, and further inflate the cost of professional efforts, by excluding circulators from the most efficient areas for contacting voters.

In Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), the Court ordered the vacating of an injunction which required the owner of a shopping center to permit any and all distribution of non-commercial handbills

on his property. The Court in Lloyd did not rule that shopping centers and their owners were exempt from the requirements of the First Amendment; rather, the Court reaffirmed Marsh v. Alabama, 326 U.S. 501 (1946), and Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968), which had held that private property which takes on some of the attributes of a public area is subject to the First Amendment. The Court in Lloyd held that the First Amendment right of free speech must be balanced against the Fifth and Fourteenth Amendment rights of property owners. In the Lloyd case, the balance was in favor of the property owner because of the very broad nature of the injunction and because of the alternatives available to the leafleters.

In footnote 11 to its opinion, the Court stressed the comprehensive nature of the injunction, which would allow any peaceful and non-commercial distribution of leaflets. Accordingly, under the terms of the injunction it was possible that the property would be subject to virtually unlimited use as a distribution area for leaflets and handbills of almost any type. In contrast, in the present case, the imposition on the property owner is sharply limited to the circulation of initiative petitions. The issue of the permissibility of other types of speech in shopping centers need not be determined in this litigation.

Not only is the imposition on the property owner much more limited in the present case than in Lloyd, but the need of the plaintiff for access to the property

is much greater. In Lloyd the Court emphasized that the plaintiffs were easily able to distribute their handbills in other places without any diminution of their effectiveness. In contrast, if initiative petition circulators are excluded from shopping centers, the initiative process may well become a thing of the past in California, at least so far as volunteer efforts are concerned. Based on the experience and familiarity of the Secretary of State's office with initiative circulation efforts, if volunteer circulation drives are excluded from shopping centers, they will have virtually no chance of success. The large number of signatures required and the short amount of time allotted makes it absolutely necessary for a volunteer effort to concentrate in the most efficient signature-gathering areas. Almost without exception, these areas are inside shopping centers.

Even well-financed circulation efforts will find it much more difficult to qualify initiative measures if they are excluded from shopping centers. Presumably the loss of efficiency will significantly raise the cost of qualifying an initiative, thereby limiting the initiative even more than at present to well-financed special interests. This will be particularly harmful because, in the experience of the Secretary of State's office, instances of fraud and deceit in connection with circulation of initiative petitions have generally been associated with professional rather than volunteer efforts. Finally, proposals to limit circulation expenditures or to prohibit

payment to circulators are pending before the Legislature. If any of these proposals are enacted and if the opinion of the District Court of Appeals is affirmed, the result could well be to make the qualification of an initiative petition a practical impossibility under any circumstances.

CONCLUSION

For the reasons stated above, the Court should grant a hearing in the above-entitled matter and should reverse the decision of the District Court of Appeals.

Respectfully submitted,

/s/ Daniel H. Lowenstein
Daniel H. Lowenstein

Attorney for Applicant
EDMUND G. BORWN JR.
SECRETARY OF STATE

APPENDIX N

ORDER OF THE CALIFORNIA SUPREME COURT
AUGUST 14, 1973

4 Civ. No. 12497
IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

DIAMOND

v.

BLAND

Application of Secretary of State of California for permission to file amicus curiae brief in support of petitioners herein is hereby granted.

Any answer thereto may be served and filed on or before August 29, 1973.

Sullivan, J.
Acting Chief Justice

APPENDIX O

OPINION OF THE SUPREME COURT OF CALIFORNIA APRIL 25, 1974

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

ROGER JON DIAMOND et al., Plaintiffs and Appellants,	L.A. 30190
v.	Super. Ct.
FRANK BLAND, as Sheriff, etc., et al., Defendants and Respondents.	No. 149671

(Filed April 25, 1974)

In 1970 this court decided the case of Diamond v. Bland, 3 Cal.3d 653, in which we held that plaintiff was entitled to solicit signatures on an initiative petition and to distribute leaflets regarding the proposal at defendant's shopping center. Two years later, the United States Supreme Court determined in Lloyd Corp. v. Tanner, 407 U.S. 551, that the owners of a shopping center in Oregon had the right to prohibit the distribution of political handbills unrelated to the operation of the shopping center. We conclude that Lloyd is indistinguishable from the instant case and, accordingly, that we must reappraise our Diamond decision in

the light of the principles established in Lloyd.

Plaintiffs are a nonprofit California corporation, its attorney, and a volunteer worker for the corporation. Prior to our decision in Diamond, two representatives of the corporation attempted to solicit signatures on an anti-pollution initiative petition and to distribute leaflets regarding the initiative at Inland Center (hereinafter Center), a shopping center in San Bernardino owned by defendant Homart.[1] Defendant refused permission, and plaintiff sought injunctive and declaratory relief, alleging that it had a constitutional right to carry out its activities at the Center. The trial court refused to issue an injunction but this court reversed the judgment. Thereafter, the trial court, in response to our decision, issued a permanent injunction restraining defendant from interfering with plaintiff's right to circulate initiative petitions and to engage in other peaceful and orderly First Amendment activities at the Center.

On June 22, 1972, the United States Supreme Court rendered its decision in Lloyd. Thereafter, defendant made a motion before the trial court to dissolve the injunction previously issued on the

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1. The Sheriff and District Attorney of San Bernardino County and the Mayor and Chief of Police of the City of San Bernardino were also joined as defendants. For literary convenience, defendants and plaintiffs will be referred to in the singular.

ground that under the holding in Lloyd plaintiff had no constitutional right to carry out its activities on defendant's property. The trial court dissolved the injunction, and this appeal followed.[2]

The facts are set forth in our Diamond opinion. Briefly, the Center consists of a large parking lot and a covered shopping complex or mall which contains three major department stores and seventy-two single businesses. The mall area is open to the public through unlocked doors, and contains such features as benches and wide, common aisleways. Prospective customers are encouraged to visit the mall and an average of 25,000 persons do so every day, coming from as far away as 75 miles. Inland Center is the largest shopping center in the county.

Defendant prohibited all activity at the Center aside from business promotions and displays, and this policy applied without variance to all types of charitable, religious, social and political groups seeking to use the Center's property for solicitation or discussion. There was no disturbance or disruption of the normal commercial functions of the

2. The trial court advanced several reasons for its action. It concluded that Lloyd was controlling, and that plaintiff had available other effective (although perhaps less desirable) sites for the solicitation of signatures, that plaintiff could seek legislative action to ease the process of solicitation, and that defendant nondiscriminatorily prohibited activities of the kind plaintiff sought to exercise at the shopping center.

Center as a result of plaintiff's attempt to collect signatures and distribute leaflets.

Our prior holding in this case was based primarily upon our interpretation of the rationale of two cases of the United States Supreme Court, namely, Marsh v. Alabama, 326 U.S. 501, and Food Employees v. Logan Plaza, 391 U.S. 308. In Marsh, the Court held that a member of a religious organization was constitutionally entitled to distribute religious literature on the streets of a company-owned town. In Logan it was decided that a shopping center could not prohibit union picketing of a business located within the center. We also relied on prior California cases applying the principles set forth in Marsh, Logan, and other cases of the United States Supreme Court. (See Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union, 61 Cal.2d 766; In re Hoffman, 67 Cal.2d 845; In re Lane, 71 Cal.2d 872.)

In Lloyd Corp. v. Tanner, supra, 407 U.S. 551, the United States Supreme Court declined to extend the rationale of Marsh and Logan to require the owner of a shopping center in Oregon to permit the respondents to distribute on the premises of the shopping center, handbills regarding the draft and the Vietnam war. The Court distinguished Logan on the basis that, unlike the situation in that case, the handbilling had no relation to any purpose for which the shopping center was being used,[3] and that respondents had

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3. By a parity of reasoning, both

adequate alternative avenues to disseminate their views by distributing the material on the public streets and sidewalks, including those surrounding the shopping center. In Logan, by contrast, the pickets would have been deprived of all reasonable opportunity to convey their message because the store which was being picketed was located in the center of a large private enclave. Marsh was distinguished on the basis that there the owner of the company town was substituting for and performing the customary functions of government; moreover, there existed no public streets on which First Amendment activities could be carried out.

In balancing the interests of the respondents in exercising their First Amendment rights against the property rights of the owners of the shopping center, the Court in Lloyd concluded that the latter must prevail. The Court stated that, in view of the availability to respondents of other public forums for the distribution and dissemination of

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Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union, supra, 61 Cal.2d 766, and In re Lane, supra, 71 Cal.2d 872, are likewise distinguishable, since in both cases labor unions had a labor dispute with and were picketing, businesses located within the shopping centers. The labor activity in those cases had a direct relation to the businesses affected by that activity, a factor which led us to strike the balance between private property rights and First Amendment activities in favor of the latter.

their ideas, "It would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist." (407 U.S. at p. 567.)[4]

Lloyd's rationale is controlling here. In this case, as in Lloyd, plaintiffs have alternative, effective channels of communication, for the customers and employees of the center may be solicited on any public sidewalks, parks and streets adjacent to the Center and in the communities in

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4. Under the holding in the Lloyd case, the due process clause of the United States Constitution protects the property interests of the shopping center owner from infringement. (407 U.S. at pp.552-553, 567, 570.) That being so, we must reject plaintiffs' proposal, echoed in the dissenting opinion herein, that we consider using the "free speech" provisions of our state Constitution to reach a contrary result in this case. Even were we to hold that the state Constitution in some manner affords broader protection than the First Amendment to the United States Constitution (a question which we expressly leave open), nevertheless supremacy principles would prevent us from employing state constitutional provisions to defeat defendant's federal constitutional rights. (Accord: Lenrich Associates v. Heyda (Ore.) 504 P.2d 112, 115-116 [plurality opn.].)

such persons reside.[5] Unlike the situation in Marsh and Logan, no reason appears why such alternative means of communication would be ineffective, and plaintiffs concede that, unlike Logan, their initiative petition bears no particular relation to the shopping center, its individual stores or patrons. Under these circumstances, we must conclude that defendants' private property interests outweigh plaintiffs' own interests in exercising First Amendment rights in the manner sought herein.

The judgment of the trial court dissolving the injunction previously issued in this case is affirmed.

BURKE, J.

WE CONCUR:

WRIGHT, C. J.
McCOMB, J.
CLARK, J.

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5. Indeed, we pointed out in our original opinion in this case that "Plaintiffs in the instant case cannot claim that effective alternative sites for their First Amendment activities are unavailable. If plaintiffs are barred from circulating their initiative petitions in the Inland Center, they are free to do so in the public streets and sidewalks in the surrounding community." (3 Cal.3d at p. 662; see also Homart Development Company v. Fein (R.I.) 293 A.2d 493 [owner may bar solicitation of petitions at shopping center].)

DISSENTING OPINION BY MOSK, J.

(as modified on May 29, 1974)

I dissent.

On December 16, 1970, this court rendered its decision in Diamond v. Bland (1970) 3 Cal.3d 653. The opinion commanded six votes, with one justice filing a three-line cursory dissent. Subsequently the United States Supreme Court on four occasions denied respondents' petition for certiorari and rehearing (402 U.S. 988; 404 U.S. 874; 405 U.S. 981; 409 U.S. 897).

Nothing has occurred relevant to the problem since the high court repeatedly refused to intervene in this proceeding other than its rendition of a 5-4 opinion in a case originating in Oregon and bearing superficial similarity to the instant matter (Lloyd Corp. v. Tanner (1972) 407 U.S. 551.) Leaning on that fragile reed, the majority now abjectly surrender the previous considered position of this court, overlook the unmistakable independent nonfederal grounds upon which our earlier opinion could have been based, ignore basic guarantees of our state Constitution and deal a blow to fundamental principles of federalism as old as our republic.

I.

Convenient as it may be to reduce diverse federal and state premises to a single body of "constitutional law," there are at least two reasons why this simplistic process is inappropriate. First, it contradicts the hierarchical logic of

constitutional doctrine. Second, the provisions and historical bases of the federal and California Constitutions are not the same.

The first point is well analyzed in an article by Professor Hans A. Linde in 49 Oregon Law Review (1970) 125, at page 133: "The federal source of all 'due process' and 'equal protection' attacks on state regulation is the fourteenth amendment's command that 'No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' Whether this command has been violated depends on what the state has finally done. Many low-level errors that potentially deny due process or equal protection are corrected within the state court system; that is what it is for. The state constitution is part of the state law, and decisions applying it are part of the total state action in a case. When the state court holds that a given state law, regulation, ordinance, or official action is invalid and must be set aside under the state constitution, then the state is not violating the fourteenth amendment. . . . By the action of the state court under the state constitution, the state has accorded the claimant the due process and equal protection commanded by the fourteenth amendment, not denied it."

Professor Linde continues with this conclusion (at p. 135) which he reports with emphasis: "Judicial review of official action under the state constitution thus is logically prior to review of the effect of the state's total action

(including rejection of the state constitutional claim) under the fourteenth amendment. Claims raised under the state constitution should always be dealt with and disposed of before reaching a fourteenth amendment claim of deprivation of due process or equal protection."

Our task, then, is to dispose of state constitutional questions before invoking federal doctrine and authority. We must, in that context, "give independent professional attention to the text, history, and function of state constitutional provisions" (Linde, p. 182). Put another way, the "logic of constitutional law demands that nonconstitutional issues be disposed of first, state constitutional issues second, and federal constitutional issues last." (Linde, p. 182.)

Inverting the process, the majority first examine the Fourteenth Amendment, as interpreted by Lloyd, find it absolutely controlling and look no further. Much as I disagree with it, I can understand how typical is the majority's dereliction in the arena of state constitutional rights. Unfortunately few state courts steadfastly protect their own state constitutional guarantees; Professor Monrad G. Paulsen found that "Although state constitutions contain full statements of our civil liberties, on the whole the record of state court guardianship of [freedom] is disappointing. Only occasionally do state cases . . . take a position protecting the freedoms beyond what has been required by the United States Supreme Court." (Paulsen, State Constitutions, State Courts and First Amendment Freedoms (1951) 4 Vand. L.Rev.

620, 642.) Yet, "State constitutions furnish extensive and sometimes unique materials which can help in the protection of human liberties. . . ." (Id. at p.620.)

The second reason why courts should not recognize a monolithic body of "constitutional law" emerges from consideration of the text and background of the Constitution of the State of California. Without citing chapter and verse, I deem the 27 sections in article I of the California Constitution, comprising our declaration of rights, to be arguably more embracing than the first 10 amendments, plus the Fourteenth, of the United States Constitution. Particularly relevant here are the guarantees provided in section 9 for every citizen to "freely speak, write, and publish his sentiments on all subjects . . . and no law shall be passed to restrain or abridge the liberty of speech or of the press," and in section 10 assuring the right of the people "to petition the Legislature [or the people acting in the legislative process] for redress of grievances," and in section 21 providing that no citizen or class of citizen shall "be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

At the time the original California Constitution was adopted in 1849, the law was clear that the federal Bill of Rights was applicable to the states. Barron v. Baltimore (1833) 32 U.S. 242 was the prevailing authority. In that legal milieu our basic document was drafted by a constitutional convention that was a reflection of the youth, heterogeneity and independence of the state at that time.

Paul Mason in Constitutional History of California (1951) page 83, notes that of the 137 sections of the original Constitution 66 were adapted from the Constitution of Iowa and 19 from the Constitution of New York. The remaining sections were copied from other state documents; reference by the framers of our basic document to the United States Constitution was at most fleeting and casual.

Indeed Judge William J. Palmer and Paul P. Selvin in their article, The Development of Law in California, West's Annotated, Constitution, volume 1, page 14, observed that "many of the problems with which the 1849 Convention concerned itself were necessarily quite dissimilar from those which had given the drafters of the Federal Constitution the most difficulty. Such differences were not illogical or anomalous. The broad, guiding principles and methods of a federation were an objective quite different from the exigent details of a sovereign state government." While a more prolix Constitution was adopted in 1879, and the state bill of rights "has been elaborated somewhat through the years, but today California's Bill of Rights still rests on the bedrock 'Declaration of Rights' of the 1849 Constitution." (Palmer and Selvin, p. 16.)

In short, the guarantees of individual liberties contained in the California Constitution were not founded upon, are not dependent upon, and have a status independent of, the Constitution of the United States.

II

Every decision by the United States Supreme Court dealing with the subject has held that the states remain free to adopt higher standards for protection of individual rights than compelled by the federal Constitution (Johnson v. New Jersey (1966) 384 U.S. 719, 733.) This court so recognized in Kaplan v. Superior Court (1971) 6 Cal.3d 150, 155, citing Cooper v. California (1967) 386 U.S. 58, and Alderman v. United States (1969) 394 U.S. 165.

In Cooper Justice Black wrote: "Our holding, of course, does not affect the State's power to impose higher standards [on constitutional issues] than required by the Federal Constitution if it chooses to do so." (386 U.S. at p. 62.) And in Alderman Justice White in analyzing the exclusionary rule made it clear that the states may extend the rule beyond what is required by the federal Constitution. (394 U.S. at p. 175.)

In Johnson v. Louisiana (1972) 406 U.S. 356, and Apodaca v. Oregon (1972) 406 U.S. 404, Justice Powell discussed the merits of federalism and the necessity for diversity among the 50 states with regard to constitutional interpretation. Requirements cannot be uniform, he indicated, noting that "it strains credulity to believe that [constitutional amendments] were intended to deprive the States of all freedom to experiment with variations." (406 U.S. at p. 376.)

It is comforting to reflect upon Elkins v. United States (1960) 364 U.S. 206, 220, and Mapp v. Ohio (1961) 367 U.S. 643,

651-652, cases in which the United States Supreme Court commended California for going beyond the personal liberty guarantees then required by the federal Constitution in adopting the exclusionary rule to assure obedience to constitutional rights. Reference was to People v. Cahan (1955) 44 Cal.2d 434.

Cahan is not the only example of the independence, and occasional prescience, of this court where individual rights are involved. In some instances we have relied upon the California Constitution exclusively, as in People v. Anderson (1972) 6 Cal.3d 628, In re Lynch (1972) 8 Cal.3d 410, In re Lopez (1970) 2 Cal.3d 141, In re Smiley (1967) 66 Cal.2d 606, People v. Clark (1965) 62 Cal.2d 870, 882, and People v. Henderson (1963) 60 Cal.2d 482, 495. In other cases we have employed both the federal and state Constitutions, as in Serrano v. Priest (1971) 5 Cal.3d 584, Raffaelli v. Committee of Bar Examiners (1972) 7 Cal.3d 288, and Curry v. Superior Court (1970) 2 Cal. 3d 707. In still other matters, where the basis was in doubt, upon remand from the United States Supreme Court we have made it clear that an independent state ground was available, as in Department of Mental Hygiene v. Kirchner (1965) 62 Cal.2d 586, People v. Krivda (1973) 8 Cal. 3d 623 and Rios v. Cozens (1973) 9 Cal.3d 454. Note numerous other decisions of this court collected in Falk, The State Constitution: A More Than "Adequate" Nonfederal Ground (1973) 61 Cal. L. Rev. 273 ff.

The foregoing illustrative cases

demonstrate the viability of two separate and distinct judicial systems as anticipated by the doctrine of federalism upon which our republic is based. In Atlantic C.L.R. Co. v. Engineers (1970) 398 U.S. 281, 285, the United States Supreme Court recognized the inherent power in the states to create and maintain "state judicial systems for the decision of legal controversies." (398 U.S. at p. 285.) Each system is to proceed independently of the other with ultimate review in the United States Supreme Court only of federal questions. Obviously, said the high court, this dual system could not function if state and federal courts were "free to fight each other for control of a particular case. Thus, in order to make the dual system work . . . it was necessary to work out lines of demarcation between the two systems." (398 U.S. at p. 286.)

Unfortunately by abjectly surrendering the right of this state court to decide on state constitutional grounds the basic issue of freedom to petition the state government for redress of grievances through state elective procedures, the majority blur the lines of demarcation between two separate and distinct judicial systems. Their abdication of the previous decision of this court is a serious blow to state sovereignty and to the independence which has previously been the hallmark of this court.

III.

The majority opinion determines that by virtue of Lloyd the United States Constitution does not compel a result in

plaintiff's favor. This conclusion, even if arguably sound, confronts only part of the problem. The majority blithely ignore the effect of our own Constitution and statutes upon the rights of plaintiff.

In my view, plaintiff's right to solicit signatures and distribute literature in connection therewith on the terrain of the Inland Center is protected under section 9 of article I of the California Constitution.[1] Although we did not dwell

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1. Article I, section 9, of the California Constitution provides in part, "Every citizen may freely speak, write, and publish his sentiments on all subjects . . . and no law shall be passed to restrain or abridge the liberty of free speech or of the press."

Defendants contend that Lloyd precludes us from applying California law to vindicate plaintiff's right to carry out its activities at Inland Center. They interpret Lloyd as standing for the proposition that the property rights of the owner of the shopping center would be violated, contrary to the Fifth and Fourteenth Amendments to the United States Constitution if he were compelled to allow persons in plaintiff's position to exercise their constitutional rights on his private property. Lloyd should not be read as placing such a broad and sweeping restriction upon a state's implementation of its own laws and policies. Although the Lloyd opinion mentions the property rights of the shopping center owner (e.g. 407 U.S. at pp. 552-553, 567), the overall thrust of the opinion imposes a restriction on the First Amendment rights of the handbill

upon that section in our original Diamond opinion, we did rely primarily on state authority (e.g., Schwartz-Torrance, Lane, Hoffman, Cox, discussed infra), and the rationale employed is consistent with the foregoing interpretation of the provisions of our own Constitution. Our holding in Diamond was based upon a determination that the interest of plaintiff in the exercise of its right of free speech must prevail when balanced against the interest of defendant in the exclusive possession and enjoyment of its private property.

The rationale we employed merits explication. For a number of years cases in this state even prior to the federal decision in Food Employees v. Logan Plaza (1968) 391 U.S. 308, have held that union members enjoy the right to picket an employer on the property of a privately owned shopping center. These decisions emphasized that an employee who sought to bring his grievance to the attention of the public and apply economic sanctions against his employer could effectively do so only at the place where the business was located, and that any incidental impairment of the shopping center owner's property rights was largely theoretical

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distributor only under the circumstances involved and the opinion recognizes that the size and diversity of activities of a shopping center might warrant a different result in another context. Defendant cites Lenrich Associates v. Heyda (Ore. 1972) 504 P.2d 112, in support of its argument, but a close examination of Lenrich discloses that there was no majority for the viewpoint advocated by defendant.

since he had opened his premises to the public and his right in the property was "worn thin by public usage." (Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union (1964) 61 Cal.2d 766, 774-775; In re Lane (1969) 71 Cal.2d 872, 878.) The theory of these cases was extended by In re Hoffman (1967) 67 Cal.2d 845, to nonpicketing situations. In Hoffman, an opinion written by Chief Justice Traynor, we held that the bare title of the owners of a privately owned railway station was not a sufficient interest to outweigh the interests of persons who attempted to distribute anti-war leaflets at the station.

The Diamond opinion recognized that although Schwartz-Torrance and Lane were factually distinguishable in some respects, the distinction did not justify striking a new balance to limit plaintiff's freedom of expression. We conceded in Diamond that in the picketing situation the only effective place for communication of the employee's message was at the place of his employer's business whereas in the instant case there were alternative sites to solicit signatures, such as the public streets and sidewalks. In spite of this possibility, we emphasized that plaintiff had a substantial interest in being able to solicit signatures and distribute information at the Center since thousands of persons congregate on foot there daily, the Center serves as the primary business district for a large surrounding community, and it is the most effective and desirable location for plaintiff's solicitation. (3 Cal.3d at p. 662.) In other words, we determined that despite

the availability of alternative sites, the balance was still in plaintiff's favor.

An important factor relied upon in Diamond was the role of the shopping center in the life of the community. Just as the company town has become an anachronism in modern society, as the opinion in Lloyd points out at page 561, so has the traditional downtown business district become outmoded in many areas as a place for residents to gather in substantial numbers. We said in In re Cox (1970) 3 Cal.3d 205, that the shopping center has undertaken the public function of providing society with the necessities of life and has become the modern suburban counterpart of the town center. (Fn. 11 at p. 216.)

The importance assumed by the shopping center as a place for large groups of citizens to congregate is revealed by statistics: in 21 of the largest metropolitan areas of the country shopping centers account for 50 percent of the retail trade; in some communities the figure is even higher, such as St. Louis (67 percent) and Boston (70 percent). (Note, 1973 Wis. L. Rev. 612, 618 and fn. 51.) Increasingly, such centers are becoming "miniature downtowns"; some contain major department stores, hotels, apartment houses, office buildings, theaters and churches. (Business Week, Sept. 4, 1971, pp. 34-38; Chain Store Age, Sept. 1971, p. 4.) It has been predicted that there will be 25,000 shopping centers in the United States by 1985. (Publishers Weekly, Feb. 1, 1971, pp. 54-55.) Their significance to shoppers who by choice or necessity avoid travel

to the central city is certain to become accentuated in this period of gasoline and energy shortage.

In view of the prominence of the shopping center as a gathering place for large numbers of people, the tenuous nature of defendant's property right in the center with regard to the entry of the public on the premises, and the fact that plaintiff is seeking to exercise at the center a right which is at the fountainhead of all of our liberties, it is my view, consistent with the cases cited above, that under article I, section 9, of the California Constitution, defendant may not prohibit plaintiff's activities on its premises.

IV.

There is in the instant case an element, not present in any of the authorities cited above, which provides additional support for vindication of plaintiff's rights. Plaintiff sought to collect signatures on an initiative petition and to distribute literature relating to the initiative. Under our Constitution, the power of initiative is reserved to the people (art. IV, sec.1), and courts are zealous to preserve its unfettered exercise "to the fullest tenable measure of spirit as well as letter." (McFadden v. Jordan (1948) 32 Cal.2d 330, 332.) In order to implement this vital policy, we have recognized that it is desirable for initiative measures to reach the ballot without delay or excessive expenditures of time, money and effort. (Gage v. Jordan (1944) 23 Cal.2d 794, 799.)

Article IV, section 22, of the California Constitution specifies that an initiative petition must be signed by electors equal in number to five percent (for a statute) and eight percent (for a constitutional amendment) of the votes cast for all candidates for Governor at the last election. At the time plaintiff sought to qualify the anti-pollution initiative, more than 500,000 signatures were required; normal attrition dictates that a considerable number in excess of that figure be obtained to assure that the petitions contain 500,000 valid signatures. The Legislature has specified in the Elections Code that proponents of an initiative measure must obtain the requisite number of signatures within a maxinum of 150 days fromthe date the Attorney General delivers the summary of the chief purpose of the measure. (Elec. Code, Secs. 3507, 3520.)

It seems evident that in order to secure such a large number of signatures in 150 days--nearly 3,500 every day--the proponents of a measure must have access to places at which a substantial number of persons congregate on a regular basis. This is particularly true in the case of poorly financed measures which must rely upon volunteers rather than upon an army of paid professional canvassers, door-to-door solicitors, and advertising through the media as a means of informing the public of the proponent's views prior to actual solicitation. In order to avoid the possibility that the initiative process will become the captive of well-financed special interest groups, and in view of the long-standing and emphatic expressions of state policy in favor of

the full and free exercise of the right of initiative, plaintiff should be accorded the right to solicit signatures on initiative petitions and distribute literature with regard to such measures at the Inland Center.

This conclusion is bolstered by the Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union, supra, 61 Cal.2d 766. We held in that case that the owner of a shopping center may not enjoin as a trespass a union's peaceful picketing of premises leased by an employer from the owner of the center. We justified our determination on the basis of the public policy in favor of concerted collective bargaining activities, as expressed in various statutes and decisions of the courts of this state. The present case is even more compelling than Schwartz-Torrance, since it seeks to vindicate a noneconomic right rooted in the Constitution--a right which is an integral part of the constitutionally created legislative process.

V.

Contrary to the ill-considered premise of the majority opinion, Lloyd is distinguishable from the present case. Lloyd involved the distribution of leaflets, while here plaintiff sought to obtain signatures on an initiative petition. A primary factor in the Lloyd rationale was that the respondents there had adequate alternative avenues of communication, so that it was unnecessary to diminish the property rights of the owners of the shopping center. The high court opinion points out that respondents

could have distributed their handbills on public streets or sidewalks, notably the streets surrounding the shopping center, as well as at the entrance to the center's parking lot, where cars were required to come to a complete stop.

Such alternatives are far less effective where, as here, solicitors seek to obtain signatures on a petition. Customers ordinarily arrive at a shopping center by automobile, and while it might be feasible as suggested in Lloyd merely to offer them a handbill while their cars are stopped at the entrance to the parking lot, it would be impossible to detain vehicle operators at the entrance to the parking lot long enough to obtain a large number of signatures.

Another significant difference between the distributor of a handbill and the solicitor of signatures on an initiative petition lies in the result flowing from interference. If the handbill distributor's activities are hampered, the consequence is only that his potential circulation is reduced; in the case of an initiative petition, either the requisite number of signatures to qualify the measure for the ballot is obtained within a stated period of time, or the entire initiative drive is a failure. These distinctions in the need for access to shopping centers distinguish the present situation from that involved in Lloyd. Indeed, we specifically recognized in Diamond that the shopping center is a highly significant vehicle for the dissemination of ideas where the activity requires time for discussion and a place to obtain signatures. (3 Cal.3d at

p. 660.)[2]

Obviously, no precise assessment is possible as to the indispensability of the role of the shopping center in the present context, and it cannot be said with certainty that an initiative measure will fail to qualify for the ballot unless it has access to shopping center throngs. In my view however, plaintiff has made an adequate showing that if solicitation of signatures at the Inland Center is prohibited a vital aspect of the election process would be seriously inhibited.

It bears repeated emphasis that we do not have under consideration the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment. As a result of advertising and the lure of a congenial environment, 25,000 persons are induced to congregate daily to take advantage of the numerous amenities offered by the Inland Center. A handful of additional orderly persons soliciting signatures and distributing handbills in connection therewith, under reasonable regulations adopted by defendant to assure that these activities do not interfere with normal business operations (see Diamond at p. 665) would not markedly dilute defendant's property rights. On the other hand, to deny plaintiff access to the Inland Center

2. Although we stated in Diamond that "effective" alternative sites were available to plaintiff, we also recognized that access to the shopping center was the most effective and desirable location for plaintiff's activities.

would appreciably diminish its ability to qualify an initiative measure for the state ballot.

With remarkable candor the majority reveal what this case is all about: "defendant's private property interests outweigh plaintiffs' own interests in exercising First Amendment rights" (see Diamond at p. 665). That naked conclusion is but a recitation of a long discredited shibboleth of nineteenth century legal and political thought. It is conspicuously misplaced in a contemporary opinion of this court.

I would prefer to heed Justice Jackson's warning in his concurring opinion in Edwards v. California (1941) 314 U.S. 160, 185: "Property can have no more dangerous, even if unwitting, enemy than one who would make its possession a pretext for unequal or exclusive civil rights." Private ownership must be respected, but its enforceable rights that diminish the fundamental rights of others should be tempered by what Justice Holmes once described as "the equilibrium of social desires."

I would reverse the trial court's order and direct the trial court to reinstate the injunction heretofore issued.

MOSK, Jr.

I CONCUR:

TOBRINER, J.

DISSENTING OPINION BY SULLIVAN, J.

I join in Parts III, IV and V of Justice Mosk's dissenting opinion. I would, therefore, reverse the order dissolving the injunction and remand the cause to the trial court with directions to reinstate the injunction heretofore issued.

SULLIVAN, J.

APPENDIX P

ORDER DENYING PETITION FOR REHEARING

(Filed May 29, 1974)

Order Due
June 24, 1974

ORDER DENYING REHEARING

L.A. No. 30190

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

DIAMOND ET AL.

v.

BLAND, AS SHERIFF, ETC. ET AL

Dissenting opinion modified.

Appellants' petition for rehearing DENIED.

Tobriner, J., Mosk, J., and Sullivan, J., are of the opinion that the petition should be granted.

/s/ Wright
Chief Justice

APPENDIX Q

ORDER OF THE SUPREME COURT OF CALIFORNIA
JUNE 26, 1974

L.A. No. 30190

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

DIAMOND ET AL

v.

BLAND, ETC., ET AL.

Application for Order Vacating Order for Denying Rehearing is dismissed as moot.

/s/ Wright
Chief Justice

CERTIFICATE OF SERVICE

I, Roger Jon Diamond, declare as follows: I am an attorney at law duly admitted to practice before the Supreme Court of the United States and I am the attorney for petitioners.

On 8/5, 1974, pursuant to Rule 33 of the Supreme Court Rules, I caused the within Appendix to Petition for Writ of Certiorari to be served on all respondents, the California Supreme Court, the California Court of Appeal, Fourth Appellate District, the San Bernardino County Superior Court, and on California Secretary of State Edmund G. Brown, Jr., amicus curiae in the California Supreme Court, and the American Civil Liberties Union of Southern California, amicus curiae in the California Supreme Court, by placing three copies thereof enclosed in a sealed envelope with firstclass postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Court of Appeal
Fourth Appellate District
640 State Building
303 West Third Street
San Bernardino, Calif. 92401

V. Dennis Wardle, Clerk
San Bernardino Superior Court
351 North Arrowhead Avenue
San Bernardino, Calif. 92401

Lonergan, Jordan,
Gresham & Varner
Allen B. Gresham, Esq.
398 West Fourth Street
San Bernardino, Calif. 92401

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157 West Fifth Street
San Bernardino, Calif. 92401

Daniel H. Lowenstein, Esq.
111 Capitol Mall
Sacramento, Calif. 95814

California Supreme Court
350 McAllister Street
San Francisco, Calif. 94102

I further certify that all parties required to be served have been served

I declare under penalty of perjury
that the foregoing is true and correct.

Roger Jon Diamond

15415 Sunset Boulevard
Pacific Palisades
California 90272

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

SEP 9
MICHAEL RODAK, JR.

No. 74-97

ROGER JON DIAMOND; WILLIAM DUXLER; AND PEOPLE'S LOBBY, INC.,

Petitioners,

vs.

FRANK BLAND, SHERIFF OF SAN BERNARDINO COUNTY; LOUIS J. FORTUNA, CHIEF OF POLICE OF CITY OF SAN BERNARDINO; LOWELL E. LATHROP, DISTRICT ATTORNEY OF SAN BERNARDINO COUNTY; JAMES LAMBERT; C. H. BARRETT; AL C. BALLARD, MAYOR OF CITY OF SAN BERNARDINO; AND HOMART DEVELOPMENT COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF IN OPPOSITION ON BEHALF OF HOMART DEVELOPMENT CO., JAMES LAMBERT AND C. H. BARRETT

LAWRENCE M. COHEN
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Gunthorp-Warren Printing Company, Chicago • 346-1717

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-97

ROGER JON DIAMOND; WILLIAM DUXLER; AND PEOPLE'S LOBBY, INC.,

Petitioners,

vs.

FRANK BLAND, SHERIFF OF SAN BERNARDINO COUNTY; LOUIS J. FORTUNA, CHIEF OF POLICE OF CITY OF SAN BERNARDINO; LOWELL E. LATHROP, DISTRICT ATTORNEY OF SAN BERNARDINO COUNTY; JAMES LAMBERT; C. H. BARRETT; AL C. BALLARD, MAYOR OF CITY OF SAN BERNARDINO; AND HOMART DEVELOPMENT COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF IN OPPOSITION ON BEHALF OF HOMART DEVELOPMENT CO., JAMES LAMBERT AND C. H. BARRETT

Respondents Homart Development Co., James Lambert and C. H. Barrett oppose the issuance of a writ of certiorari to review the decision and judgment of the Supreme Court of California which issued in this case on April 25, 1974 (Pet. App. O, pp. A99-A124).

QUESTIONS PRESENTED FOR REVIEW

Whether, notwithstanding *Lloyd Corp.* v. *Tanner*, 407 U. S. 551 (1972), the owner of a shopping center may be compelled, in derogation of its Fifth Amendment property rights, to have its private commercial property confiscated for the use of those who wish to engage in petition circulation thereon notwithstanding that (1) the activities are unrelated to any business of the center and (2) there are effective alternative locations in which to engage in such activities.

COUNTERSTATEMENT OF THE CASE

Petitioners' statement of the case is adequate with two exceptions. *First,* contrary to Petitioners' assumption (Pet., p. 4), petition circulation is not, and has never been, permitted on Homart's private shopping center property (See Pet. App. C., pp. A18-A19; Pet. App. E, pp. A28-A29; Pet. App. G, p. A51; Pet. App. O, p. 101). *Second,* Petitioners erroneously assert (Pet., pp. 18-19) that no evidence was presented to demonstrate that there were effective alternative means and locations to conduct their activities; ample such evidence was presented to and repeatedly accepted by and the California Supreme Court, Appellate Court and Supreme Court (See Pet. App. C., P. A19; Pet. App. E., pp. A30-A31; Pet. App. G., pp. A59-A60; Pet. App. J., p. A72; Pet. App. K, pp. A77-78; Pet. App. O, p. A104-A105).

REASONS FOR DENYING THE WRIT

1. Petitioners' principal contention is that, by virtue of California law, an exception should be created for one means of expression, initiative petition solicitation, that does not exist for other comparable activities, e.g., handbilling, as a result of *Lloyd*. This same argument, however, was made to and rejected

by the ultimate arbitrator of California law—the California Supreme Court. That court's construction of state law is, of course, binding on this Court (*Saltonstall* v. *Saltonstall*, 276 U. S. 260, 270 (1928)) and does not raise a question worthy of review.

2. Petitioners further contend that *Lloyd* did not resolve the issue presented by this case. This contention is erroneous. The instant case falls squarely within the ambit of *Lloyd:* the desired activity is unrelated to the Homart center's operations; there were effective alternative sites for such conduct; the center's invitation to the public is limited to the conduct of its business; and there has been no assumption whatsoever of any municipal function or power by Homart. Moreover, this Court has previously declined to grant certiorari in this very case. Not only was the initial petition denied (402 U. S. 936 (1971)), but, subsequently, three separate petitions for rehearing also were denied (404 U. S. 874 (1971); 405 U. S. 981 (1972); and 409 U. S. 897 (1972)). Even though the most recent petition for rehearing arose in the post-*Lloyd* period, this Court again chose not to grant certiorari.

Petitioners mistakenly rely upon a pre-*Lloyd* case, *Sutherland* v. *Southcenter Shopping Center, Inc.*, 3 Wash. App. 633, 478 P. 2d 792 (Ct. App. 1970), and disregard the post-*Lloyd* cases, *Homart Development Company* v. *Fein*, 293 A. 2d 493 (R. I. Sup. Ct., 1972), and *Lenrich Associates* v. *Heyda*, 504 P. 2d 112 (Ore. Sup. Ct. 1972), which directly undercut their position. This Court's 1972 decision in *Lloyd*, it is submitted, needs no clarification. Petitioners, in assuming that subsequent decisions of this Court have vitiated *Lloyd*, place improper reliance upon *Police Department* v. *Mosley*, 408 U. S. 92 (1972), *Grayned* v. *City of Rockford*, 408 U. S. 104 (1972), and *Steffel* v. *Thompson*, ..., U. S. ....., 39 L. Ed. 2d 505 (1974), notwithstanding that the first two cases involved *picketing* on *public property* and the latter decision did not reach the merits of the substantive issue of the propriety of the conduct there involved.

3. Finally, Petitioners contend that the California Supreme Court failed to consider various factual distinctions between the instant case and *Lloyd*. The court below, however, considered such asserted differences at length (Pet. App. O, pp. A101-A102, A104-A105) and, in any event, this Court does not "grant a certiorari to review evidence and discuss specific facts". *United States* v. *Johnson* 268 U. S. 220, 227 (1925).

CONCLUSION

For the above stated reasons, the petition for writ of certiorari should be denied

Respectfully submitted,

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SUPREME COURT, U. S.

SEP 16 19

MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-97

ROGER JON DIAMOND; WILLIAM DUXLER; and PEOPLE'S LOBBY, INC.,

Petitioners,

vs.

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Respondents.

PETITIONERS' REPLY BRIEF

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Attorney for Petitioners.

PEOPLE'S LOBBY PRESS LOS ANGELES

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-97

ROGER JON DIAMOND; WILLIAM DUXLER; and PEOPLE'S LOBBY, INC.,

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Respondents.

PETITIONERS' REPLY BRIEF

Respondents Homart Development Company, James Lambert and C. H. Barrett (hereinafter "respondents") argue in their brief in opposition to the petition for a writ of certiorari that this case involves nothing more than a factual dis-

pute resolved by the state courts against petitioners. This view of the case is simply incorrect. Neither the California Supreme Court's four-to-three split nor the Court of Appeal's two-to-one split involved a factual dispute. The different opinions rendered by the majorities and dissenters of those courts related solely to their views of the application of Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) to the undisputed facts of the instant case.

Until respondents filed their Brief in Opposition with this Court, they did not consider this case to involve a factual dispute.

Mr. Allen B. Gresham, attorney for respondents throughout these proceedings, advised the trial court when the matter was first before it on November 14, 1969:

> "MR. GRESHAM: Yes, your Honor. I wonder, before I did, though, if I might make a brief opening statement at this time. As Mr. Diamond has indicated to the Court and I think the Court will find, this is a very interesting case to deal with. It involves a very unique question of law and one which is of vital concern to a great many people.
>
> As has been indicated, I think the facts will be relatively easy to present to the Court and in most cases there will be little or no dispute. It is, as has been indicated, a question of the application of the law to this situation. . . ." (RT I, 4-5)

In their Memorandum of Points and Authorities filed with the trial court respondents admitted that "The testimony is generally uncontroverted." (CT I, 53).

The trial court and respondents both agreed that the case primarily involved a legal issue:

> "THE COURT: . . .
> Gentlemen, it would appear that pursuant to stipulation the situation is as you have indicated, counsel. This is primarily a legal question rather than [a] factual situation.
>
> MR. GRESHAM: Yes."
>
> (RT I, 9).

In their Reply Brief filed with the Court of Appeal in connection with petitioners' initial unsuccessful appeal to the Court of Appeal (Diamond v. Bland, 8 Cal.App.3d 58, 87 Cal.Rptr. 97 (1970), vacated and reversed by the California Supreme Court, 3 Cal.3d 653, 91 Cal.Rptr. 501, 477 P.2d 733 (1970), respondents stated at page 3,

> "Respondents agree with Plaintiffs that the facts are not in dispute."

What has been in dispute ever since this case began is the legal conclusion to be drawn from the facts. The courts below have grappled with this aspect of the case.

After respondents unsuccessfully

petitioned this Court for certiorari in an attempt to overturn petitioners' initial victory in the California Supreme Court, they moved the trial court to dissolve the permanent injunction and based their motion solely upon the ground that Lloyd Corp. v. Tanner, supra, required it as a matter of law. In response to their motion, the trial court ruled as a matter of law that where a nonrelated use is pursued at a shopping center there are necessarily effective alternative means of communication. In the court's own language:

> "This Court finds no distinction in the fact that Lloyd involved handbilling and this case involves initiative petition solicitation. In each instance, Lloyd held that, as a matter of law, there are necessarily effective alternative means of communication where a non-related use is sought to be engaged in on private property. . . ."
>
> (Pet. App. J, pp. A 73-74)

Thus, the California courts ruled as a matter of law, based on Lloyd, that there were effective alternative means available because the message of the initiative petition was unrelated to the shopping center. This ruling, then, was a legal conclusion, not an evidentiary finding. Respondents, in their Brief in Opposition, have attempted to transform a legal dispute into a factual dispute in order to persuade this Court to deny certiorari. As stated above, the facts are clear. They are not what so closely divided the California Supreme Court and

the Court of Appeal. What did divide these courts is, among other things, the same legal issue which divided the Oregon Supreme Court in Lenrich Associates v. Heyda, 504 P.2d 112 (Ore. 1972).

Respondents essentially conceded that the instant case is not factually the same as Lloyd Corp. v. Tanner when they filed a "Joint Motion For Leave to Engage in Oral Argument" in Lloyd Corp. v. Tanner, in which it is stated at page 2:

> "1. Homart and Diamond are uniquely qualified to provide assistance to this Court that is not otherwise available. The litigation in No. 1469 [Homart v. Diamond, October Term, 1970] raised recurrent and important questions, critical to an appropriate resolution of this controversy, apart from those presented by the parties hereto. For example, by granting this motion, the Court would gain the experience of Homart and Diamond's views on such additional significant aspects of the present dispute as . . . (c) whether the decision of the Court in the present case has equal force to an initiative solicitation campaign where the alternative channels of communication available are both less numerous and less effective . . . ."

Respondents assert in their Brief in Opposition that the California Supreme Court considered the factual differences between Lloyd and the instant case (Resp. Br., p.4).

As stated above, the California Supreme Court did not analyze the difference between handbilling and petition circulation. Respondents' reliance on U.S. v. Johnston, 268 U.S. 220 (1925) is misplaced. This Court merely stated that it "does not grant a certiorari to review evidence and discuss specific facts." 268 U.S. at 227. Petitioners are not asking this Court to review evidence and discuss specific facts. Petitioners are asking this Court to review legal conclusions based on uncontroverted facts. This is precisely what this Court did in Edwards v. South Carolina, 372 U.S. 229 (1963), wherein an examination of the record which contained no substantial conflict was conducted.

Respondents erroneously imply that this case involves nothing more than an interpretation by the California courts of California law (Resp. Br., pp. 2-3). Of course, if this were the case, respondents should not have attempted to persuade this Court to grant certiorari. See Homart Development Co. v. Diamond, 402 U.S. 988 (1971); Homart Development Co. v. Diamond, 404 U.S. 874 (1971); Homart Development Co. v. Diamond, 405 U.S. 981 (1972); Homart Development Co. v. Diamond, 409 U.S. 897 (9172). The majority of the California Supreme Court in the second Diamond v. Bland case clearly felt that respondents' federal constitutional rights precluded it from reaching the state constitutional issues presented (Pet.App. O, p. A 104). This Court has not hesitated to reverse a state supreme court decision which erroneously concludes that the federal constitution prevents the following of state law. See Olsen v. Nebraska ex. rel.

Western Reference & Bond Ass'n, 313 U.S. 236 (1941).

Respondents assert that petitioners mistakenly rely upon a "pre-Lloyd" case, Sutherland v. Southcenter Shopping Center, Inc., 3 Wash.App. 833, 478 P.2d 792 (Ct. App. 1970). Although this case was decided prior to Lloyd, the injunction issued in the case apparently remains intact. The case has not been overruled. It is precisely on point: it involves an initiative petition circulated on a shopping center pursuant to state law.

Respondents contend Police Department v. Mosley, 408 U.S. 92 (1972) and Grayned v. City of Rockford, 408 U.S. 104 (1972) are distinguishable because they involved picketing on public property. Whether the property is public or private cannot be determinative, however. Otherwise this Court would have overruled Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968).

In Steffel v. Thompson, ___ U.S. ___, (1974) this Court necessarily, at a minimum, must have concluded that Lloyd did not absolutely bar the activity in question (handbilling at a shopping center). Otherwise, this Court would have simply ruled the controversy was no longer a continuing one.

For the reasons stated in the petition and this reply brief, certiorari should be granted to decide the questions presented and unanswered by Lloyd Corp. v. Tanner.

Respectfully submitted,

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Attorney for Petitioners.

CERTIFICATE OF SERVICE

I, Roger Jon Diamond, declare as follows: I am an attorney at law duly admitted to practice before the Supreme Court of the United States, and I am the attorney for Petitioners.

On 9/12/74, 1974, pursuant to Rule 33 of the Supreme Court Rules, I caused the within Petitioners' Reply Brief to be served on all respondents, the California Supreme Court, the California Court of Appeal, Fourth Appellate District, the San Bernardino County Superior Court, and on California Secretary of State Edmund G. Brown, Jr., amicus curiae in the California Supreme Court, and the American Civil Liberties Union of Southern California, amicus curiae in the California Supreme Court, by placing three copies thereof enclosed in a sealed envelope with first class postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Court of Appeal
Fourth Appellate District
640 State Building
303 West Third Street
San Bernardino, Calif. 92401

V. Dennis Wardle, Clerk
San Bernardino Superior Court
351 North Arrowhead Avenue
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California Supreme Court
350 McAllister Street
San Francisco, Calif. 94102

I further certify that all parties required to be served have been served.

Roger Jon Diamond

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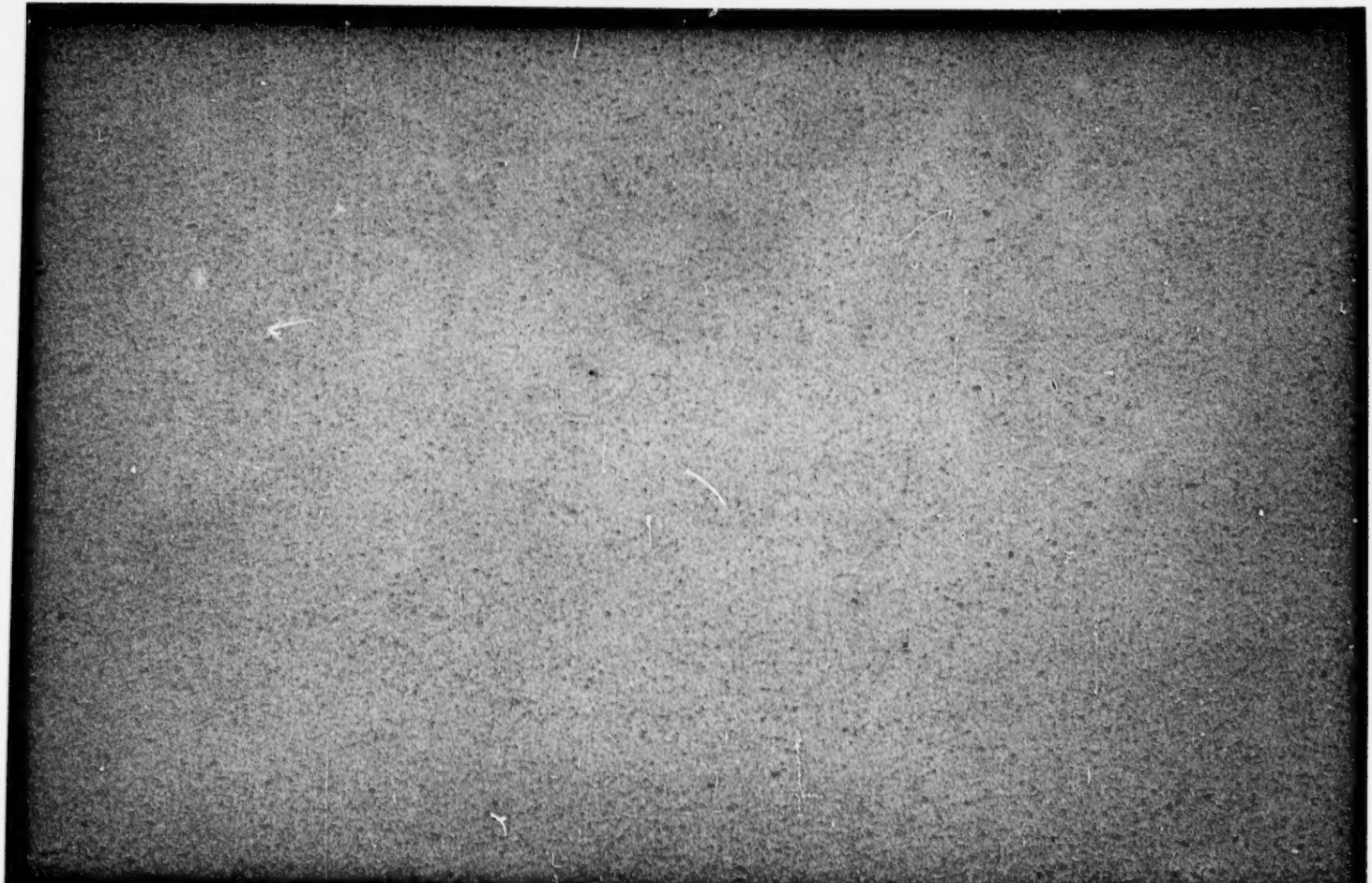

SUPREME COURT, U. S.
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Respondents.

On Petition For A Writ of Certiorari To The Supreme Court of the State of California

PETITION FOR REHEARING

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PEOPLE'S LOBBY PRESS, LOS ANGELES

IN THE

Supreme Court of the United States

October Term, 1974

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Respondents.

PETITION FOR REHEARING

Petitioners herein respectfully move this Court for an order (1) vacating its order of October 15, 1974 denying the petition for writ of certiorari in this case, Mr. Justice Douglas and Mr. Justice Stewart being of the opinion that the petition should be granted, and (2) granting the petition. On October 31,

1974 Mr. Justice Brennan extended the time in which to file a petition for rehearing to and including December 9, 1974.

Rehearing is sought because of the following intervening circumstances:

1. Amendments to the California Constitution effective November 6, 1974;

2. Amendments to the California Government Code effective January 7, 1975;

3. Comments of Chief Justice Warren Burger reported on October 15, 1974

If rehearing is granted and certiorari is granted, this Court should resolve the constitutional issues presented in the petition for certiorari in light of the enumerated intervening circumstances. At a minimum, this Court should grant certiorari, summarily vacate the judgment of the California Supreme Court, and remand the case to that court for reconsideration of its four-to-three decision in light of the substantial intervening circumstances which have occurred at the state level.

I. AMENDMENTS TO CALIFORNIA CONSTITUTION

On November 5, 1974 the California electorate voted to amend the California Constitution, and the amendments became effective on November 6, 1974. Article I, Sections 9 and 10 (the free speech and petition provisions of the California Constitution, Pet.App. A., pp. A2-A3)

were repealed.

Justice Mosk, writing for the three dissenters on the California Supreme Court, based his decision partly on Article I, Section 9 of the California Constitution (Pet.App. O, p. A114).

Although Sections 9 and 10 were repealed by the California electorate, substantially similar provisions were added to the California Constitution. Article I, Section 2 now provides as follows:

> "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

Article I, Section 3 now provides as follows:

> "The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good."

It should be noted that the new "petition clause" is broader than the old (Article I, Section 10) because the right to petition has been extended from the right to petition the "Legislature" to the right to petition "government."

More important than the changes noted above is the addition of Article I, Section 24 to the California Constitution:

> "Rights guaranteed by this

Constitution are not dependent on those guaranteed by the United States Constitution.

This declaration of rights may not be construed to impair or deny others retained by the people."

The addition to the California Constitution of this amendment is a significant intervening circumstance. It goes to the heart of the dispute between Justice Burke's four-justice majority opinion and Justice Mosk's three-justice dissenting opinion. Justice Mosk concluded that petitioners' rights were protected by the California Constitution, which afforded petitioners greater rights than they possessed under the federal constitution. Justice Burke did state that the question was being left open (Pet.App. O, p. 104) because, in his view, Lloyd v. Tanner, 407 U.S. 551 (1972), is based on the property right of the shopping center, not the absence of a First Amendment right in the leaflet distributor. As noted in the petition for certiorari, there is great uncertainty in the lower courts and among the legal commentators as to the precise meaning of Lloyd v. Tanner. Pet. pp. 36-37.

This constitutional change alone requires, at a minimum, this Court to vacate summarily the judgment below and remand with directions to the California Supreme Court to reconsider its opinion in light of the change. Parenthetically, it should be noted that Justice Burke retired from the California Supreme Court on November 20, 1974, leaving a three-to-three split on the issue. Perhaps the

vote of his replacement will make the difference (just as the loss of the late Justice Raymond E. Peters from the first six-to-one Diamond v. Bland majority apparently led to the second four-to-three reversal (Justice Clark, Peters' replacement, voted to overrule the prior decision)). (Mr. Justice Marshall dissenting in Lloyd v. Tanner, 407 U.S. 551, 584 (1972), recognized the effect of the composition of a court upon the decision it renders.) (It also perhaps should be noted that Secretary of State Edmund G. Brown, Jr., who filed an amicus curiae brief in support of petitioners in the California Supreme Court (Pet.App. M, pp. A91-A98) was elected Governor of California on November 5, 1974. Governor-elect Brown, in view of the denial of certiorari, cannot determine whether to seek a statute specifically authorizing the utilization of shopping centers for the circulation of initiative petitions. It is not clear whether such a statute would be constitutional. The present opinion of the California Supreme Court indicates that in its view this Court would strike it down. Yet this Court has not spoken. The California Legislature will not enact a law the California Supreme Court believes would be invalid. Petitioners cannot enact such a statute by an initiative petition without access to shopping centers.)

II. LIMITATION ON EXPENDITURES; CALIFORNIA GOVERNMENT CODE

Another significant intervening circumstance is the addition of Sections 85200 and 85201 to the California Government

Code regarding the limitation on expenditures which may be incurred in the circulation of statewide initiative petitions. These sections will become effective on January 7, 1975. They provide as follows:

> "85200. No person shall incur any expenditure in furtherance of a circulation or qualification of a statewide petition without the express or implied authorization of the proponent. For purposes of this article, 'expenditure' does not include:
>
> (a) Unreimbursed expenses incurred by a circulator incidental to his circulation of the petition;
>
> (b) Expenditures for advertising or speech regarding the measure unless the advertising or speech is directly incidental to circulation of the petition.
>
> "85201. Not more than twenty-five cents ($0.25) multiplied by the number of signatures required for qualification, adjusted for cost of living changes, shall be spent in furtherance of the circulation or qualification of a statewide petition."

Throughout the litigation in the instant case there has been no limit on the amount of money which could be spent to circulate and qualify a statewide initiative petition for the ballot. The absence of any restriction on the expenditure of funds to collect signatures

on petitions is inextricably related to the major premise of the majority opinion of the California Supreme Court, i.e., that there are effective, alternative methods of gathering signatures on petitions. As Secretary of State Edmund G. Brown, Jr., pointed out in his amicus brief, many California initiative petitions qualified for the ballot because of the financial resources of the proponents of the measures. If cost is not a factor, promoters of initiative petitions might be able to pay persons to go door-to-door in the communities and gather signatures in this time consuming and expensive fashion. Thus, with no financial limitation, effective, alternative means of circulating initiative petitions may exist (which petitioners do not concede). However, the limitation on expenditures for qualifying initiative petitions will force all proponents to seek locations where numerous signatures can be gathered with little expense, such as shopping centers. Secretary of State Brown noted in his amicus brief the relationship between the availability of alternatives and the cost of qualifying initiative petitions. Indeed, he anticipated the enactment of financial limitations. Governor-elect Brown stated in his brief,

> "Finally, proposals to limit circulation expenditures or to prohibit payment to circulators are pending before the Legislature. If any of these proposals are enacted and if the opinion of the District Court of Appeals (sic) is affirmed, the result could well

be to make the qualification of an initiative petition a practical impossibility under any circumstances." Pet.App. M, pp. A96-A97.

In view of the new financial restrictions on expenditures to qualify initiative petitions for the ballot and the significance to the majority of the California Supreme Court of the availability of alternative (but obviously more expensive) methods of petition circulation, at a minimum this Court should vacate the judgment of the California Supreme Court and remand to that court for the purpose of permitting it to reconsider its opinion.

III. COMMENTS OF THE CHIEF JUSTICE

Statements made by the Chief Justice were published in the Los Angeles Daily Journal on October 15, 1974, the same day certiorari was denied. The Chief Justice announced his concern about the increasing workload of the Court. A copy of the article is included as an appendix to this petition.

The action of the Court in denying certiorari can only lead to an increase in litigation, both state and federal, with the resulting continued and increased burden on this Court which the Chief Justice apparently would like to see lessened. By denying certiorari in this case, which involves the right of the initiative guaranteed by the constitutions of twenty-one states, this Court has necessarily made it much more difficult, indeed impossible in most cases, for citizens of these states to partici-

pate in that form of the legislative process known as the initiative. Without shopping center access, citizens simply cannot gather enough signatures in the time allotted to qualify a measure for the ballot.

Often, the subject of a citizen initiative drive is the same as a lawsuit. The instant case is an excellent example. It involves an attempt to enact anti-pollution legislation by the initiative process.

When the legislative system fails (initiative or representation), persons turn to the judiciary. Thus, the battleground for clean air shifted to the judiciary. See, e.g., In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122 (9th Cir. 1973); City of Chicago v. General Motors Corporation, 467 F.2d 1262 (7th Cir. 1972); Diamond v. General Motors Corp., 20 Cal.App.3d 374, 97 Cal.Rptr. 639, 47 A.L.R. 3d 759, 3 E.R.C. 1227 (1971). Some air pollution cases have reached this Court on appeal, e.g., City of New York v. United States, 397 U.S. 248 (1970), and some have been brought as original proceedings, e.g., Washington v. General Motors Corp., 406 U.S. 109 (1972).

Numerous other social problems which are brought to the judiciary could be solved by the legislative process. By limiting the legislative process, this Court forces frustrated citizens to turn to the courts for help. The Chief Justice has previously stated his preference for legislative solutions to social problems. See United States v. Richardson, ___ U.S.

___, 41 L.Ed 2d 678, 689-690 (1974) and Schlesinger v. Reservists to Stop the War, ___ U.S. ___, 41 L.Ed 2d 706, 716-722 (1974).

A decision in favor of petitioners would result in a reduction in the workload of this court, and the workload of the judiciary in general. The more opportunities citizens have to participate in the legislative process, the less will be the demands they place on the judiciary. Obvious also is the fact that the availability of the initiative process reduces the likelihood that frustrated citizens will resort to socially unacceptable methods to accomplish their goals.[1]

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioners pray that this Court grant rehearing of the order of denial, vacate that order, grant the petition and either hear this case on its merits or summarily vacate the judgment below and remand to the California Supreme Court for reconsideration of its opinion in light of the intervening circumstances enumerated herein. On a

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1. A statute adopted by the initiative process may lead to judicial action if it is unconstitutional. This is true of any statute. An initiative statute was declared violative of the state and federal constitutions by the California Supreme Court in Weaver v. Jordan, 64 Cal. 2d 235 (1966).

previous occasion in this case the Chief Justice and Justice Blackmun voted to grant certiorari and also voted to grant a rehearing, Homart Development Co. v. Diamond, 402 U.S. 988 (1971); 405 U.S. 981 (1972). Now Justices Douglas and Stewart favor the granting of certiorari. Petitioners respectfully urge this Honorable Court to grant the rehearing requested.

Respectfully submitted,

Roger Jon Diamond

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Attorney for Petitioners.

CERTIFICATE OF COUNSEL

As counsel for Petitioners, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2) of this Court.

Roger Jon Diamond

ROGER JON DIAMOND
Counsel for Petitioners

APPENDIX A

Los Angeles Daily Journal, Oct. 15, 1974

Burger Complains Of High Caseload

Supreme Court to Begin Hearing Record Number of Appeals Today

WASHINGTON (UPI)—The Supreme Court begins its first week of hearing oral arguments in its new term today, and Chief Justice Warren E. Burger says the workload is getting out of hand.

Burger has frequently complained about the number of cases the court must consider and said in a statement Sunday there is a "serious need for new solutions for the court's growing workload."

The justices considered a record 1,000 appeals of various kinds during last week's conferences. Only a small fraction will be scheduled for oral arguments and a written decision by the court.

Burger said that since he took his seat five years ago there has been a 40 percent increase in the number of appeals considered in the first week.

There were more than 5,000 appeals coming to the high court last year, up from 2,000 some 25 years ago he said.

But Justice William O. Douglas, who has been on the court longer than anyone in history, disagrees, saying he is able to complete his work in four days instead of five.

Official court statistics released with Burger's statement reveal that Douglas is the most prolific of the justices, writing more opinions, concurrences and dissents than anyone else.

Douglas was credited with 65 written opinions and memoranda last term, far ahead of Byron R. White, who wrote 40. Burger, whose duties include overseeing the entire federal judicial system, wrote the fewest, 19.

Douglas dissented 43 times, more than any other colleague, and if the court deals with major civil liberties cases this term, he may be a frequent dissenter again.

An analysis of court actions last year showed it did not extend any civil liberties measures, but neither did it overrule any, according to a survey by the American Jewish Congress.

The AJC analyzed 77 civil liberties cases decided last term. It found that the high court ruled in favor of those parties seeking to assert a right in 36 instances and against them in 40.

The decisions included such issues as school desegregation, obscenity rulings and several cases involving other forms of free speech.

Douglas was, in the AJC's opinion, the most consistently liberal member of the court, voting for expanded civil liberties in 70 of 75 decisions.

The court's newest member, William Rehnquist, was the most conservative. He voted for civil liberties positions in only 18 of the 76 decisions in which he was involved.

CERTIFICATE OF SERVICE

I, Roger Jon Diamond, declare as follows: I am an attorney at law duly admitted to practice before the Supreme Court of the United States, and I am the attorney for petitioners.

On 11/27, 1974, pursuant to Rule 33 of the Supreme Court Rules, I caused the within Petition for Rehearing to be served on all respondents, the California Supreme Court, the California Court of Appeal, Fourth Appellate District, the San Bernardino County Superior Court, and on California Secretary of State Edmund G. Brown, Jr., amicus curiae in the California Supreme Court, and the American Civil Liberties Union of Southern California, amicus curiae in the California Supreme Court, by placing three copies thereof enclosed in a sealed envelope with first class postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Court of Appeal
Fourth Appellate District
640 State Building
303 West Third Street
San Bernardino, Calif. 92401

V. Dennis Wardle, Clerk
San Bernardino Superior Court
351 North Arrowhead Avenue
San Bernardino, Calif. 92401

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California Supreme Court
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San Francisco, Calif. 94102

I further certify that all parties required to be served have been served.

Roger Jon Diamond

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